THE
EFFECTS OF WAR ON CONTRACTS

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BY

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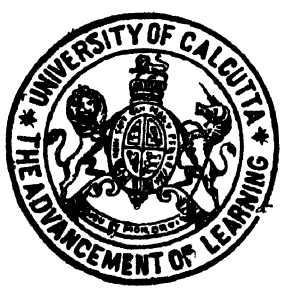

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PREFACE

This little book presents in a slightly modified and enlarged form the Onauth Nauth Deb Law Research Prize Essay of the Calcutta University for the year 1917. In writing out this volume I have drawn mainly upon the standard treatises on International Law, text-book writers of note on the subject, law periodicals, reports and reviews, English, American and Continental. The first hints were obtained from the reference of Abdul Kader Khalifa *v.* Fritz Käpp reported in 20 C. W. N., 691. The notable English decision of Janson *v.* Driefontein Consolidated Mines Ld., 1902, A. C., 484, has considerably helped me in expounding and formulating the numerous questions bearing on the subject.

The sources from which I have derived my materials have all been acknowledged at their proper places. I cannot but too deeply feel the invaluable assistance that I have obtained from a study of the authors mentioned in the bibliography.

The outbreak of the great European war caused a sudden change in the existing commercial and financial relations of nations and individuals; and the world at large was anxious to know the true position with regard to enemies and allies, and how far public need should have superseded the existing private rights of individuals. An enquiry into the subject at the psychological moment proved of great use in appreciating the complicated relations of States and individuals brought about by the widespread hostilities. It was, therefore, thought eminently desirable that a careful consideration and clear expression of the different opinions on the varying problems should have been made eventually, leading to the systematization of the doctrines of International Law on the subject which had hitherto been applied only rather indifferently by the civilized nations of the world.

I have made my own observations in a very guarded way because it is needless to say that on a subject like this it is only

the renowned Jurists and Publicists that can speak with some degree of authority and affirmation.

In conclusion I beg to associate this humble attempt of mine in the realm of Comparative Law Research to my ever dear and esteemed friend, Mr. Nogendra Nath Bose, M.A., M.R.A.S. (London), Barrister-at-law and Advocate, High Court, Calcutta, because it is to him that I owe my first inception for an interest in the study of the subject.

HIGH COURT,
CALCUTTA. } P. C. G.
January 20, 1920.

TABLE OF CONTENTS

PART I

Effects of War on Contracts as between Belligerent and Belligerent.

Part II

Effects of War on Contracts as between Belligerent and Neutral.

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A

B

E

G

T

U

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[1] Added in 1920. These articles throw additional and up-to-date light on some of the topics dealt with in the book as they appeared long after the thesis had been submitted and adjudged.

[2] Added in 1920 for the same purpose as indicated above.

[3] Added in 1920 also for the same purpose.

ABBREVIATIONS OF REFERENCES EXPLAINED

Am. Dec.—American Decisions.
A. C.—Appeal Court, Chancery, Appeal Cases.
B. & P.—Bosanquet and Puller's Reports, C.B.
Black.—Black, United States Supreme Court.
Burr.—Burrow's Reports, K. B.
Comm.—Commentaries.
C. W. N.—Calcutta Weekly Notes.
Ch. Rob.—Chitty's Chancery Reports.
C. A.—Court of Appeal, U. S., Supreme Court.
Cr.—Cranch's Reports.
Co. Rep.—Coke's Reports, K.B.
Doug. K.B.—Douglas' Reports, K.B.
Dowl. & Ryl.—Dowling and Ryland's Reports, K.B.
Desau(sc.)—Desaussure's South Carolina Courts of Chancery and Courts of Appeal.
East.—East's Reports.
E.—East's Reports.
E. & B.—Ellis and Blackburn's Reports.
E. & E.—Ellis and Ellis' Reports, Q. C.
Eq. Pl.—Equity Pleadings.
Exch. Rep.—Welsby, Hurlstone and Gordon's Reports
Gall.—Gallison, U. S. Circuit Court.
H. & N.—Hurlstone and Norman's Reports.
I. R.—Irish Reports.
John.—Johnson's Reports.
Jus. Ins.—Justinian's Institutes.
Jus. N. S.—Jurist, New Series.
K. B.—King's Bench.
L. R. C. P.—Law Reports, Queen's Bench Cases.
L. Q. R.—Law Quarterly Review.
L. T. R.—Law Times Reports.
L. J.—Law Journal (English).

L. A. Ann.—Louisiana Annual, Supreme Court.
M. & S.—Maule and Selwyn's Reports, K. B.
Mod. Rep.—Modern Reports, K. B.
Q. B. D.—Queen's Bench Division.
Q. B.—Queen's Bench.
Raym.—Lord Raymond's Reports.
Rich. Eq. S. C.—Richardson, South Carolina, Court of Appeals and Court of Errors in Equity.
Ro. Abr.—Rolle's Abridgement.
Rob. Add. Rep.—Robinson's Admiralty Reports.
Russ. & Myl.—Russell and Myland's Reports.
Salk.—Salkeld's Reports.
S. C.—Supreme Court.
T. R.—Term Reports, Durnford and East.
Taunt.—Taunton's Reports.
T. L. R., C. A.—Times Law Reports, Court of Appeal.
U. S. Rep. S. C.—United States Reports, Supreme Court.
Ves. B.—Vesey and Beame's Reports, Chancery.
Wheat.—Wheaton's U. S. Supreme Court.
W. N.—Weekly Notes (English).
Wall.—Wallace's Reports.

PART I

Effects of War on Contracts between Belligerent and Belligerent.

Chapter I

Introductory Observations

Works on International law there are many, but none treats of the legal aspects of the subject matter of this essay as a whole. They concern themselves neither with the Statute Law nor with the English Law Reports. Books on Martial Law are also of no avail for that very reason. Treatises on Municipal Law have always kept this subject outside their province; while books on Comnon Law and Constitutional Law are very meagre in their treatment thereof. Contributions on this subject to the periodical legal literature, though often learned and informing, are few and far between, and have dealt only with one or two solitary aspects of this matter. The pamphlets and booklets which treat of the subject are more or less brief narratives, lacking in that historical and philosophical outlook, which only, on the one hand, throw adequate light on the important questions thereof; and on the other, make it interesting and thoughtful reading. It must, therefore, be owned that there is a dearth of regular and systematic treatises dealing with the subject.

The reason for the paucity of literature on such an important legal topic is not far to seek. It is due to the peculiar position in which the British Empire has remained during the last hundred years or so. Since the struggles with Napoleon the British Empire has been practically in the uninterrupted enjoyment of peace, and her naval and commercial position has

never before been so seriously and directly in struggle for supremacy as at the present moment. In the continued enjoyment of peace and prosperity the English people have naturally forgotten the legal relationships which ought to exist between subjects of the warring nations. Consequently the present war has been something of a shock and surprise. In fact, for the last three generations or so, Great Britain has not made any great distinction between her own subjects and those of other countries, affording all aliens coming within her shores almost the same rights as have been accorded to her own people.

As a matter of course war upsets the position of men and normal condition of affairs and things. The difficulties and problems which it creates for the mercantile community are great in number, and even greater in complexity. In a war Great Britain feels the situation much too keenly inasmuch as she is primarily a commercial nation and owes her prosperity and greatness more to commerce than to anything else.

In time of peace the disputes under International Law are mainly determined by that system of Municipal Law which governs the dealings between the nations concerned, and when this is ascertained, the positive law of one country, or the other, is brought to bear upon the determination of the question with the aid of the proper courts to interpret the law and executive powers to enforce obedience to such law. (Cf In *the matter of Rudolf Stallmann* reported in 39 Cal. p. 164 and cases discussed thereunder). But at the time of war the courts of belligerent powers remain closed to the alien enemy, and as between the states themselves, observance of International Law becomes only a matter of convention.

On the outbreak of a war there needs must naturally arise some difference in the treatment which is to be meted out to the subjects of the enemy state. The practice usual with the British and American peoples is to treat as friends all who remain in the country and obey her laws, also not adhering or giving comfort to the enemy, and as neutrals those who remain in the neutral countries; but to treat as enemies, at any rate for commercial

purposes, those who remain in the enemy country and so assist the enemy by payment of taxes and enrich him by trade, and to refuse access to the courts those who, though neutrals, adhere to the enemy by rendering him direct assistance in the war. The Continental practice is to treat generally all subjects of the enemy state as alien enemies wheresoever they may be found.

The American view on this subject coincide to a very great extent with the British. Therefore British-American decisions are, in all cases involving the questions under discussion in this essay, cited as authoritative utterances in the courts of both countries. Much of the decided matter is deduced either from British or American, or from British-American views combined, and made to suit particular cases. One cannot ignore the fact in this connection that the legal system of the Americans, 'is essentially English, although their administrative system is Continental' as has been so pithily observed by Professor Lawrence. The American decisions have, therefore, been freely quoted and accepted as pursuasive authority in matters which have not hitherto been decided in the British courts.

The law which forms the foundation of most of the decided cases in Great Britain is mainly the Common Law of the land added to the old Statute Law, which, since the outbreak of the present war, has been supplemented by Statutes, Orders in Council, and Proclamations that have come into being during the continuance of this war. Accordingly the British Law on the subject results from the combined effects of the foregoing ingredients and admixture with the American Law.

The subject matter for discussion in this thesis is the effect of the outbreak of war on all the legally-binding agreements and relations between subjects of belligerent states on both sides, or between subjects of a belligerent state with those of a neutral state and on the enforcement of those agreements and relations by the British courts. The rules on this subject are frequently, therefore, referred to as rules of International Law, but they are, in fact, purely rules of Municipal Law.

Chapter II

Consideration of the topic—What is war—How war is brought about—Prevailing practice—Instances of such practice—Judicial notice of the existence of war—Courts not to decide upon war and peace—How war affects mutual relations of the belligerent parties.

The subject 'Effects of War on Contracts' discloses by its very name a topic which falls evidently partly within the province of International Law, and partly within that of Municipal Law. A historical and comparative analysis of the subject is therefore necessary to enable us to review the law thereon, as it was in days gone by, and as it is at the present moment, and every aspect thereof has to be very carefully discriminated, and the present law clearly settled and laid down for future practice and guidance.

The treatment of the subject falls into two main divisions namely: (1) Contracts between citizens of two belligerent states; (2) Contracts between citizens of one of the belligerent states and those of a neutral state.

The ordinary rule of contract stands good only in time of peace, that is to say, in the normal condition of the nations. But in the exceptional time of war, this rule like many other rules of law, becomes, to all intents and purposes, abrogated. It is now therefore necessary to find out what a war is.

As to what constitutes war or a state of war, no better definition can be offered than that which Dr. Hall gives in his well-known treatise on International Law, 6th Edition, at page 60. The passage runs thus: "When difference between States reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up in which the combatants may use regulated violence against each

other until one of them has been brought to accept such terms his enemy is willing to grant. This definition was accepted by Mathew, J., in *Driefontein Consolidated Mines v. Janson*, 1900, 2 Q.B. 343. The belligerents need not be States in the full sense of the term as accepted in International Law. Thus, when a party in rebellion, as happened in the case of the American Civil War, hold and occupy a certain portion of territory in a hostile manner, throw off allegiance, organize armies and commence hostilities against their former sovereign, the world would recognise them as belligerent and the contest as war (*Lewis Co. v. Ludwick* 1869, 98 Am. Dec. 459). A state of war may also exist independently of, and prior to a declaration of war (*The Nayade*, 1802, 4 Ch. Rob. 251). But this can only be effected by an actual commencement of hostilities (per Mellish, C. J. in *the Teutonia*, 1872, 4 P. C. 179).

Mere absence of diplomatic intercourse between Great Britain and a foreign Power and the exclusion of British commerce from the latter's ports do not constitute a state of war, if there has been no declaration of war, nor any act of hostility (*Muller v. Thompson*, 1811, 2 Camp., 609). In that case a voyage was made to Konigsberg, in 1810, although strained relations existed at that time between Great Britain and Prussia and British ships were being actually excluded from Prussia. Lord Ellenborough, who gave the judgment in that case, held the voyage to be perfectly lawful inasmuch as he said no war had been declared and no acts of hostility had been committed.

The general practice of the modern times has been to observe that the commencement of hostilities is usually to be preceded by a formal declaration, or a manifesto issued by the belligerent state to the neutral states. There had been several instances of such observance in recent times. Thus the Franco-Prussian War of 1870 was preceded by a formal declaration handed by Mons. Benedittе to Count Bismark. Similarly the Russo-Turkish War of 1877 was announced by a formal despatch sent to the Turkish Chargè d'affaires in St. Petersberg. The relations

existing between France and China in 1884 and 1885 were substantially those of war and were preceded by a manifesto from France to the neutrals, whereby she claimed full belligerent rights against them with regard to blockade and contraband. The Russo-Japanese War of 1903, though not preceded by a formal declaration, commenced when the Japanese Consul received his pass port and returned home from St. Petersberg. Also in the two recent European wars—in the war that broke out at the Balkan Peninsula in 1910, hostilities sprang up after a formal ultimatum followed by a formal declaration; and in the present war which began in 1914, the English Foreign Secretary, Earl Grey, communicated through Sir Edmund Goschen, Ambassador at Berlin, a formal ultimatum to the German Government and followed it by a formal declaration of war. The same view was formulated by the Hague Peace Conference of 1907, where it was laid down for the guidance of the civilised nations that hostilities between two Powers must not commence without a previous and unequivocal warning, which should take the form, either of a declaration of war, giving reasons therefor, or of an ultimatum with a conditional declaration of war (Cf. Art. I). It is after a due and proper observance of such a condition that a state of war is now generally brought about and the doctrine represents the prevailing tendency of the modern civilized world.

English Law recognises a state of war and a state of peace, but no intermediate state (*per* Lord Davey in *Janson v. Driefontein Consolidated Mines Ld.*, 1902, A.C. at p. 493). War and imminence of war are always to be discriminated. The actual existence, and not the mere imminence of war, is necessary to bring about the result consequent upon a state of war prevailing. It appears, therefore, that however critical may be the condition of affairs, and however imminent the war may be, if and so long as the Government of the state abstains from declaring, or making war, or accepting a hostile challenge, there is peace—with all its attendant circumstances for its subjects.

But the question arises whether courts are bound to take judicial notice of the existence of war, or it is like a fact that is required to be proved by evidence like all other facts in issue. Where the war is made by a formal declaration, the publication thereof is a conclusive proof of the existence of war conditions; but the American view seems to be that the courts shall presume a condition of peace and a continuation of treaties, until and unless the Government officials declare to the contrary. In British India the law is laid down in Section 57, cl.(11) of the Indian Evidence Act (No. I of 1872), where it is declared that Courts shall take judicial notice of *the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons.* It has been seen from experience that it belongs to the Government of the country (Executive) to determine in what relation of peace or war any other country stands towards it. In every country it is for the Supreme Government—whatever that may be in each particular case—to determine the policy of the community with regard to war and peace. It is not for private individuals, nor for courts of justice, to pronounce upon the foreign relations of sovereigns or their countries, to measure their own responsibility arising out of civil contracts, or to measure their own responsibility by a standard of public policy which they set up for themselves. It would thus be unsafe for courts of justice to take them up without the authority of the Executive and to decide upon those relations. But when the Crown has decided upon the relations of peace and war in which any country stands to the British, there is an end of the question; and in the absence of any express promulgation of the will of the Sovereign in this respect, it may be collected from other acts of the state (*Janson v. Driefontein Consolidated Mines Ld.*, 1902, A. C. 497; *Blackburn v. Thompson*, 1812, 15 East. 89.) Thus it is for the Crown, and not for the courts, to determine when a state of war exists.

It must not also be supposed that war is an 'illegality' and although it terminates, as a matter of course friendly relations between the belligerent states, as also between their citizens

yet there remain for both some duties and obligations which it has been the distinct province of International Law to observe and enforce. We are in this essay concerned primarily with this aspect of the question.

The existence of war between Great Britain and any other state is a matter of public knowledge and need not be proved by express evidence (per Buller J. in *Lord George Gordon's Case*, 1787; 22 Howell's State Trials at p. 230; also per Campbell, C. J. in *Alcinous* v. *Nigren* 4 E and B, 218; Foster's Discourse of High Treason at p. 219).

Writers on International Law have unanimously declared that the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealing between the subjects of the belligerent states. The doctrine is founded on the principle that a declaration of war puts not only the adverse governments, in their political capacity at war, but renders all the subjects of the one the enemies of the subjects of the other. The same rule has also obtained in English Common Law from a very remote period. The same doctrine of non-intercourse was incidentally but elaborately discussed in the *East India Company v. Sands* (10 How. St. Tls. 371) and it was conceded there that all contracts and dealings with the enemy after the declaration of war were unlawful. Likewise in the case of the *Neptune*, 6 Rob. Adm. Rep. 405, Sir William Scott observed: "It is well known that a declaration of hostilities naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. Also that great authority Nelson, J., observes that on a state of war supervening—'the people of the two countries immediately become the enemies of each other, all intercourse, commercial or otherwise, unlawful.' *The Prize Cases*, 1862, 2 Black, 635). It made no difference if the goods were purchased before the war (*The St. Phillip* cited in *Potts v. Bell* 8.T.R. 556). So strictly was the rule interpreted that where an Englishman attempted to remove from the enemies country his property acquired before the war the

property was confiscated (*The Juffrouw Louisā Margaretha*, 1 Rob. Adm. Rep., 203, cited by Sir W. Scott; also Sir William's observations in *the Odin* 1 Rob Adm. Rep., 248, and in *the Cosmopolite*, 4 Rob. Adm. Rep., 8).

Chapter III

Definition of Aliens—Who are Alien enemies and Alien friends—Tests of Enemy character—Person and property of Enemies—Historical grounds—Present restricted position of resident Alien enemies.

First, who is an Alien?—An alien is a person who is not a British subject, either natural-born or naturalized. He is a person who owes no allegiance to the British Crown, but is the subject of some other sovereign. A person who was originally a natural-born British subject may, under the Naturalisation Act and other rules of law, become naturalized in a foreign state and thereby divest himself of his status as a British subject and become an alien. An alien may be either a friend or an enemy. If he is the native-born subject of a state at war with England, he is an 'alien enemy' (*Calvin's* case, 1608, 7 Coke Rep. 1.) Subsequently the term was applied not only to alien subject by birth, but also by naturalisation. The term afterwards got a further extension of meaning and included for the purpose of trade and commerce, a person residing or trading in a hostile country, even though not a natural-born or naturalized subject of that state. An 'alien friend' is a person who is not an alien enemy, that is, a person whose sovereign or state is at peace with the British Crown. The distinction between an alien enemy and an alien friend is found for the first time in Coke's Institutes 129(*a*) and 129(*b*). In Bracton's time this distinction did not probably exist; for in his time, it seems "an alien, whether friend or enemy was alike outside the ambit of the King's court, and had no strict right to the protection of civil remedies." But in Coke's time commerce

increased with communication and intercourse abroad, and Coke had to find out a loop-hole to meet the growing needs of the society. For this purpose he drew a distinction between an alien, who is the subject of one that is an enemy to the king and one that is in league with the Crown and invented the terms 'local and temporary allegiance' in contradiction to 'natural and permanent allegiance.' The term local allegiance was first applied by him to the allegiance of an alien, who, because he is as within the British Dominions, owes temporary allegiance to the Crown. Then he proceeded to define an alien as a person who does not owe any sort of allegiance to the Crown, whether permanent or temporary, and thereby restricted the term to alien enemy. Coke then proceeds to lay down the law thus:— 'An alien enemy cannot maintain any real or personal action as long as both nations are at war, but an alien, that is in league, may maintain personal action, for such an alien may trade and traffic, buy and sell, and therefore of necessity he must have personal action.'

The following passage from Halsbury's Laws of England very lucidly explains and defines the present position of aliens. "The law as to British Nationality and the Status of Aliens was consolidated and amended by the British Nationality and Status of Aliens Act 1914 (4 and 5 Geo. 5, C. 17) which came into operation on the 10th January, 1915. An 'Alien' is a person who is not a British subject, and a 'British subject' is a person who is a natural-born British subject, namely: (*a*) Any person born within His Majesty's dominions and allegiance: (*b*) any person born out of His Majesty's dominions, whose father was a British subject at the time of the person's birth and either was born within His Majesty's allegiance, or was a person to whom a certificate of naturalisation had been granted; and (*c*) any person on board a British ship, whether in foreign territorial waters or not (*Ibid* S. 1 (1).) Therefore a child born before the 1st January, 1915 in a foreign state, of a naturalized British subject does not acquire the status of a British subject (*Rex v. Albany*

Street Police Station Superintendent, 1915, 2 B. K., 716 1915; 31 T. L. R., 634). The child of a British subject whether that child was born before or after the 17th August, 1914, is deemed to be born within his Majesty's allegiance, if born in a place where, by treaty, capitulation, grant, usage, sufferance, or other lawful means His Majesty exercises jurisdiction over British subjects. A person born on board a foreign ship is not deemed a British subject by reason only that the ship was in British territorial waters at the time of his birth. (Cf. the British Nationality and Status of Aliens Act, 1914, 4 and 5 Geo. 5 C. 17 S. 1(2).) Also by the German Imperial and State Nationality Law of 1913, S. 13 a "former German" can now recover full German nationality without even going back to Germany at all, and therefore the British courts regard as an alien a natural-born German resident in England, who has not become naturalized and who has been absent for 10 years from his country (*Ex parte Weber*, 1915, 31 T. L. R. 602), or who has not obtained a formal discharge from German nationality (*Rex* v. *Vine Street Police Station Superintendent*, 1915, 32 T. L. R., 3). In both those cases the alien enemies were also regarded as prisoners of war and could not therefore take advantage of the Habeas Corpus under the law of England. (*Cf.* Art: Alien: Halsbury's Laws of England, supplementary volume for 1916).

It is interesting to note that Regulations were passed in England on 19th January, 1916, known as the British Nationality and Status of Aliens Regulations (India) of 1916, which have been reissued in this country by Notification No. 507C, dated the 11th February, 1916, and as the title shows, concerns naturalisation of persons in British India.

Whether a person is an alien or not is to be determined by English Law (*In re Adam*, 1837, 1 Moo. P. C. 460).

Next who is an Alien enemy? The practice in early days was to consider every subject of the enemy country as a natural enemy. But this idea has now undergone a great modification. According to the British and American practice a domiciled resident of a country takes his nationality from the place of his

residence even without naturalisation. The primary definition of an 'alien enemy' is that which is given in *Calvin's* case (1608, 7 Cok. Rep. I.) It was as follows: "an alien enemy is a natural-born subject of the state which is at war with Great Britain." Also an alien enemy is one whose sovereign or state is at war with his Majesty the King (*Sparenburgh* v. *Bannatyne*. 1 B & P, 163, and Aliens Restriction (Consolidation) Order, Art. 31). In fact, this definition has been embodied in the Trading with the Enemy Proclamation No. 2 of 9th September, 1914. But this definition is only for the purpose of the Order in Council and is different from that which applies in the case of commercial transactions as will be noticed later on.

The personal status of aliens, for example—their liability to expulsion and registration—is determined by whether or not they come within the above definition of alien enemy, for their personal status follows from their nationality or permanent allegiance.

It does not follow, however, that all persons who by nationality or permanent allegiance are the subjects of an enemy sovereign or state, are necessarily or for all purposes to be regarded and treated as alien enemies (Cf. Trading with Enemy Proclamation, No. 2, 9th September, 1914). The civil status of aliens, and other persons, for example, their rights and disabilities in respect of litigation, contracts, torts, trade and property, depends, in great measure, upon whether or not they are clothed with the enemy character.

On this question, Dr. Hall, in his well-known treatise on International Law, 6th Edition, p. 491, observes as follows: 'A foreigner living and established within the territory of a state is to a large extent under its control; he cannot be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support and his property is liable like that of subjects to such extraordinary subsidies as the prosecution of a war may demand. 'His property being thus an element of strength to the state, it may reasonably be treated as hostile by an enemy. Conversely, when the foreigner lives in a neutral

country he is so far subject to its sovereignty that it can restrain him from taking advantage of its territory to do acts of hostility against the enemy of his state, and it is responsible for his acts if he does them. For the purposes of the war, therefore, he is in reality a subject of the neutral state., A subject of a neutral state residing or trading in the enemy territory is an alien enemy. (*Albrecht* v. *Sussman*, 1813, 2 Ves & B, 823). Also a British subject who adheres to the king's enemies by residing or trading in a hostile state is an alien enemy (*Willison* v. *Patteson*, 1817, 7 Taunt, 439). So also a British subject, even though domiciled in British territory, may acquire enemy character by being a shareholder in or a mortgagee of, an enemy ship and may thus suffer loss, through the capture of such vessel as prize of war by a British cruiser (*The Marie Glaeser*, 1914, 13 T. L. R., 469).

The following is what the learned writer in Halsbury's Laws of England says on the definition and status of an alien enemy: 'The test of enemy status is not nationality but the place of carrying on business (*Porter v. Freundenberg*, 1915, 1 K. B., 851.; *Kreglinger v. Samuel* (*S*) *v. Rosenfeld, Re Mertens Patents*, 1915, 1 K. B. 857 C.A.; *Re Sutherland* (*Mary Duchess*) *Bechoff David & Co., v. Bubna* 1915, 31 T. L. R., 248.) A subject of enemy state residing either in an allied state or in a neutral state carrying on business in partnership with the subjects of allied state in the capital of that state is held not an alien enemy. (*Rex v. Küpfer*, 1915, 2. K. B. 321, C. C. A). A British subject carrying on business in the enemy country treated as an alien enemy. The occupation by an invader of the territory may make the invaded and occupied territory enemy territory, and in such circumstances, a subject of a friendly state, the territory of which is in hostile occupation, cannot communicate from the territory with his business agent in the invaded territory as to his business there, although at outbreak of war he was trading in both countries (*Mitsui v. Mumford* 1915, 2 K. B. 27; compare also *Société Anonyme Belge des Mines D'Aljustrel* (Portugal) *v. Anglo-Belgian Agency* Ld., 1915,

2 Ch. 409 C. A., in which it has been held that a company incorporated under the laws of Belgium (an allied state) with its registered office at Antwerp, but the business of which had, after the outbreak of the European war, been removed to, and carried on wholly in, London, was not an enemy company inasmuch as Belgium was not an enemy state, although the greater part of it was in hostile occupation.)

From the foregoing passages from Halsbury on the definitions of 'alien' and 'alien enemy' it is seen that momentous changes have been brought about in the status and privileges hitherto enjoyed by foreigners on the English soil. The change in the definition of a British-born subject is important as it considerably alters the position of all European British-born subject in British India covered by the term as defined in the Code of Criminal Procedure of 1898 (Act V of 1899), Sec. 4(i) i & ii. No alien enemy in British India is allowed to sue in the courts of British India, whether he resides in British India or in a foreign country, unless his residence in British India is with the permission of the Governor-General in Council, in which case only he can sue as if he were a subject of His Majesty (*Cf.* Sec. 83 of the Code of Civil Procedure Act V., of 1908.)

Authorities on International Law have differed in opinion as to how far the domicil, which will determine the question whether an individual is to be regarded as an enemy, differs from civil domicil in its essential elements (Cf. Dicey's Conflict of Laws, 2nd ed., p. 240.) The main difference appears to be that whilst an individual's civil domicil is determined by ascertaining the country which he regards as his 'home', his war domicil is determined by ascertaining whether he intends during the war to adhere to the king's enemies, and to benefit the enemy by residing or carrying on business in territory belonging to, or in the occupation of the enemy (Cf. *Mitsui v. Mumford*, 1915, 2 K. B. 27; *U. S. v. Rice*, 4 Wheat 246).

Lord Lindley has expressed an opinion in the House of Lords upon the question of the acquisition of a civil status through

establishing a place of business in a state as follows: when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war, that is important. An Englishman, carrying on business in an enemy's country, is treated as an alien enemy in considering the validity or invalidity of his commercial contracts (*M'Connell* v. *Hector*, 1802, 3 B. & P., 113). Again the subject of a state at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend upon his nationality, nor even upon what is his real domicil, but on the place of business in which he carries on his business or businesses (*Wells* v. *Williams*, 1698, 1 Salk, 46). As observed by Sir William Scott, the Great Prize Court authority, in *the Yonge Klassina* (1804, 5 Ch. Rob. 302). "A man may have mercantile concerns in two countries, or if he acts as a merchant in both, he must be liable to be considered as a subject of both with regard to the transactions originating respectively in those countries. That he has no fixed counting-house in the enemy's country will not be decisive" (quoted by Lord Lindley in his judgment in *Janson* *Driefontein Consolidated Mines, Ld.*, 1902, A.C. at page 505; compare also *the Portland*, 1800, 3 Ch. Rob. 41).

The meaning of the term alien enemy when used in reference to civil rights and liabilities was considered in some detail by the Court of Appeal in the recent case of *Porter* v. *Freudenberg*, 1915, 31. T. L. R., 163, Lord Reading, C. J., who delivered the judgment of the case, cited the passage from Lord Lindley's speech in *Janson's* case and proceeded in the following strain: "Lord Lindley's statement was not intended to be, and is not, exhaustive. His Lordship, for the purposes of the appeal then before the House of Lords, was considering the character of a trading corporation, and did not purport to deal with persons residing, but not carrying on business in the enemy territory. Such a person is equally treated as an alien enemy provided he is voluntarily resident there, having elected to live under the protection of the enemy state. For the purpose

of determining civil rights a British subject of a neutral state, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of a hostile nationality resident in hostile territory."

From the middle of the seventeenth century the laws of war have been continuously softened with the growth of humanity. Napoleonic wars, long peace, general softening of manners and the mutual amenities of commerce, have all exercised their influence in bringing about radical changes in the ideas as to the position and property of enemies. Accordingly the original 'rightlessness of all aliens', as proclaimed Littleton, gradually gave way to 'rightlessness of enemies' only. So by the eighteenth century a sort of temperamentum was introduced in the dealings between the warring countries. It became customary, in the declaration of war itself for the Sovereign to promise formal and ample protection to alien enemies being in the realm and demeaning themselves peaceably. To deny them rights after such a promise would have been contrary to good faith. Consequently Sir M. Foster observes that in such case they enjoy full protection for their persons and property in a manner like the native subject. His object was to estimate their liability to be tried for treason, and he grounds that on the correlative protection they enjoy. So if they are given an individual license or safe-conduct, they enjoy civil rights within the terms of the instrument (Cf. Sir M. Foster's Discourse of High Treason). But it does not follow that in the absence of such a guarantee of full royal protection, and of any individual licence implying the same, they are in anything like the same privileged position. If they are merely permitted to remain, all that the Sovereign can certainly be said to guarantee to them is personal safety. The Crown guarantees neither their possessions nor their contracts. It may, and it generally did, confiscate the former. And no right of action was ever or is now allowed on the latter even by a Petition of Right. This is the position which the alien enemies appear to have been allowed by tolerance

to hold in the present war. By no clause of the Declaration of War has the king taken them into his formal protection. By no proclamation has His Majesty expressly or tacitly done more than to permit their presence subject to various arbitrary regulations. This cannot be considered as a general licence to live on the footing of Englishmen and it certainly does not amount to an individual licence. The utmost that can be said is that it is equivalent to a revocable licence to remain at the alien's own risk (except as regards his personal safety) and perhaps to carry on a strictly limited commerce. But during the present war even that amount of privilege has not been granted to the alien enemies trading in India. It is true that the Aliens Restriction Rules (21 (c)) refer to the enemy aliens doing business; and an agreement has been founded on this expression, in favour of theory that a tacit licence has been granted to alien enemies to enter into valid contracts. But it is perfectly possible to transact business without having power to contract. Minors do so, not to speak of bankrupts. A licence must be clear and specific. A casual expression in a hurriedly drafted set of rules will not establish it (*Thurn & Taxis (P)* v. *Moffitt*, 1915, 31, T. L. R., 24).

The old proclamations of war have now become useless and dangerous amid the modern conditions of intermingling populations and diverse commercial interests. The Crown reserves full liberty to act, and does not limit its rights by any qualifications in the declarations of war as before. Accordingly the present practice is simply to tolerate the presence of enemies without leading them to expect any legal status. They may be called upon to obtain certificates or to register themselves, but that is not to be interpreted as giving them licence. Where an alien enemy was domiciled in the United Kingdom and had registered her place of abode in compliance with an Act, it was held that it did not amount to a licence to reside there (*Alciator* v. *Smith*, 1812, 3 Camp. 244). In this connection one cannot fail to compare the issue of the *Times* of 20th January 1914 where registration was considered as licence. On the present occasion the 'Emergency'

legislation passed for an extraordinary state of things has armed the Government with express statutory power to deal with aliens. The Government has also availed itself of that power to restrict their movements by penal sanctions. But the Crown has issued no word which would necessarily lead an alien enemy to believe that he is taken under the aegis of the state in as full a manner as any natural-born British subject is. The expression "enemy," says Finlayson Trotter in the Proclamation relating to Trading with the Enemy, No. 2 of 9th September 1914, "means any person or body of persons of whatever nationality resident or carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

The usual tests of enemy character are: (1) Nationality or Political Status, (2) Domicile, (3) Establishment of a house of trade in the enemy country, (4) Joining the forces of the enemy, (5) Traffic or trade with the enemy.

(1) *Nationality or Political Status*: There are four modes by which nationality or political status arises. (*a*) By birth. By the laws of both England and America, nationality or political status of a person is primarily determined by the place or locality of his birth. Thus a person who (whatever may be the nationality of the father) is born within the British Dominions becomes a natural-born British subject by reason of his birth. But there are important exceptions to the rule both at Common law and at Statute law. They are: (1) A person who (his father being an alien enemy) is born in a part of British Dominions, which at the time of that person's birth was in hostile occupation, is an alien enemy (*Calvin's* case 1608 7 Co. Rep. 1). (2) Any person whose father (being an alien) is at the time of that person's birth an Ambassador or other Diplomatic Agent accredited to the British Crown by the Sovereign of a foreign state is an alien, although born within the British Dominions. (*b*) By descent. By the laws of Germany and Austria the test of political status is to be found in the nationality of the parents. This principle is recognised also by the English law. Thus a person whose father or paternal

grand-father is born within the British Dominions (although not himself born within the British Dominions) is a natural-born British subject, provided the father is at the time of such person's birth, a natural-born British subject, and not in actual service of any foreign Prince or State in enmity with the British Crown. By the law of France also the test is the nationality of the parents, subject to a right of the child born in France of foreign parents to elect French nationality within a year of his attaining majority. (*c*) By marriage. The nationality of a married woman is changed to that of her husband whatever her original nationality may be. Thus in *Ann De Wahl* v. *Brawne* (1856, 1 Hurls. & W. 178) it has been held that an English wife of an alien is an alien enemy. Even when living separately from her husband in England she could not, under the old disabilities attaching to married women, sue as a *feme sole* on a contract made by her, although such husband being an alien could not be conjoined with her in the action. But the status of a married woman has changed since then. Now a woman married to an alien can make a declaration that she desires to retain her British nationality and thereupon she will be deemed to remain a British subject (Cf. The British Nationality and Status of Aliens Act, 1914: 4 & 5 Geo. 5., C. 15. Sec. 10, which come into operation on 1st January 1915) provided she has also complied with the requirements of registration etc, (*Princess of Thurn and Taxis* v. *Moffitt* 1915, 31 T.L.R., 24. (*d*) By naturalisation. Naturalisation implies change of one political status and the adoption of another. Naturalisation effects a complete adoption of British nationality. It involves two questions: (1) How far will it be recognised by the parent state as exempting the person naturalized from the consequences of his earlier allegiance, or in other words, how far will the right of expatriation be recognised? This right was denied by the Common law, but was afterwards recognised by the Naturalisation Act of 1870. The right of expatriation has come to be universally recognised as an inherent right of all people and has been adopted by all the civilised countries on account of the

rapidly changing conditions of modern life and the exigencies of modern trade and commerce ; (1) Under what conditions will it be granted by the state to which the alien seeks to affiliate himself ? These conditions vary in different countries, but residence in the country for a certain period of time and a declaration of his intention to become naturalized before some administrative authorities seem essential in all civilized communities. No disabilities any longer attach to a person who has been naturalized, although naturalisation does not involve necessarily renunciation of such former naturality.

(2) *Domicile*—Domicile is another factor which serves to determine the enemy character of a person or body of persons. When a man gets into the country of the enemy and settles there for an indefinite period of time with the intention of returning to his native country on the happening of some particular event which may or may not happen, he is said to acquire a domicile in that country (*O'Mealey* v. *Wilson* and *another* Nisi Prius, 1 Camp., 481). When he has acquired such a domicile, disposition of his immovable property in the country, in the event of his death, will be governed by the law of the country of his adopted domicile. As to how domicile is a factor in the determination of the enemy character the following passage from Twiss' Law of Nations, Vol III, p. 299 will speak for itself. "Under this system of public law, domicile has become the criterion of national character for purposes of war, and accordingly all natural-born subjects of a belligerent power who may have abandoned their native country and have acquired a domicile in a neutral country before hostilities have commenced, will have effectually clothed themselves with the character of neutral subjects, precisely as every natural-born subject of a neutral power will have clothed himself with the character of an enemy subject by a long-continued residence coupled with the intention of remaining in the enemy's territory." Personal domicile or domicile of origin is held to be independent of trade. That domicile has nothing to do with trade is further apparent from a judgment of Justice

Story in *the Study for the Propagation of the Gospel* v. *Wheeler*, 1814, 8 Cr., 132. "It is not," observes Story, J., "the private character or conduct of an individual which gives him the hostile or neutral character. He may have retired from business devoted to more spiritual affairs, or engaged in works of charity, religion, and humanity, and yet his domicile will prevail over the innocence and purity of life." Sir W. Scott speaks of "that character which mere personal residence will give him" as distinct from the character stamped on an individual by the vocation of his trade. Domicile is loosely called residence in this sense. Thompson (Cf. *Laws of War*, 1854, at p. 27) appears to be the first authority who formally identified domicile with trade.

For the purpose of commercial relations and in regard to the prohibition of intercourse with enemies, question is not of civil domicile but of what is called "commercial domicile." Long-continued residence is not necessary for that purpose. The test is residence in the country, whether recent or of long duration with the intention of continuing to trade there (Cf. Dicey's Conflict of Laws, 2nd. ed. p. 737). Thus an Englishman who continues to reside and trade in Germany or Austria during the war of 1914 is an alien enemy, as is a Dutchmen or an American acting in the same manner (*M'Connel* v. *Hector*, 1802, 3 B & P., 113). But a German or an Austrian, remaining in England and having made England his home, would, in regard to all his contracts, property, commercial relation with others, within the British dominions has the same rights as an Englishman and is entitled not to be treated as an enemy provided he does no hostile act; also a German or an Austrian residing and trading in Holland, Sweden, or America, may claim the rights of a neutral trader. The recital in the Proclamation of 9th September 1914 that "it is contrary to law *for any person resident, or carrying on business or being in our dominions* to trade or have any commercial or financial transactions with any person *resident or carrying on business in the German Empire or Austria-Hungary*

without our permission" has been doubted as to the law it lays down. It is considered to be much too restrictive, as it would preclude an Englishman in England from trading with an American in America, if the latter also carried on business in Germany or Austria.

'The national character of a merchant', says Halleck, 'is determined by his commercial domicial, and not by the country to which his allegiance is due, either by his birth or subsequent naturalisation or adoption. He is regarded as a political member of the nation into which, by his residence and business, he is incorported, and as a subject of the Government which protects him in his pursuits, and to the support of which he contributes by his property and industry. This rule of decision is adopted both in Prize Courts and in Courts of Common Law and is applied in a belligerent country to its own subjects, (Cf. Halleck's International Law, 4th ed., Vol I p. 444).

'A commercial domicil' says Dicey, 'is such a residence in country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly or neutral character should be determined by reference to the character of such country'.

'Again the subjects of a state at war with this country, but who is carrying on business here.....is not treated as an alien enemy. The validity of his contracts does not depend on his nationality not even on what is his real domicil, but on the place or places in which he carries on business or businesses' (*Wells* v. *Williams* 1 Ld. Rayd 282 ; *Usparicht* v. *Noble*; 13 East, 322 ; *Kensington* v. *Inglis*,, 8 East, 273) ; cf. Dicey's Conflict of Laws, 2nd Ed. p. 742.)

In British India a man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin (cf. sec. 10 of the Indian Succession Act, X of 1865). In the *Explanation* thereto it is said that a man is not to be considered as having taken up his fixed habitation in British India, merely by reason of his residing there

in Her Majesty's Civil and Military Service, or in the exercise of any profession or calling. A further extension of the principle has been made in Section 12 of the aforesaid Act to the effect that domicile is not acquired by residence in this country as a representative of a Foreign Government or as a part of his family. It is interesting to note how statutory domicile is acquired in British India. Section 11 of the Act provides for it. It runs thus : 'Any person may acquire a domicile in British India by making and depositing in some place in British India (to be fixed by the Local Government) a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been residents in British India for one year immediately preceding the time of his making such declaration.'

The principle involved in the foregoing observations is that a person, whether by nationality, an ally or neutral, who remains and trades in the enemy's country after the commencement of war, adheres to the enemy and supports him by trading and paying taxes (The *Indian Chief*, 1801, 3 Ch. Rob., 12); his ships on the sea are liable to seizure, no intercourse may be held with him, and he is precluded from suing in the national courts. But British subjects are not liable to further penalties unless they take part in hostilities against their own country (*O'Mealy* v. *Wilson*, 1808, 1 Camp., 428 ; *M'Connell* v. *Hector*, 1802, 3 B & P., 113). It is to be noted, however, that if the residence in the hostile country is for the purpose of carrying on business licensed by the Crown, it does not create an enemy character (*Ex parte Baglehole*, 1812, 18, Ves. 526). On the other hand, a person, whether a British subject, or an ally or a neutral, who remains or trades in a neutral country, has all the rights which a natural-born subject of the neutral country possesses, and such a British subject may even trade with the enemy to the same extent as neutrals may do (*Bell* v. *Reid*, 1813, 1 E & S 726 ; *Murray* v *The Charming Betsy* 1804, 2 Cr. at p. 120). And in the same way a natural-born subject of an enemy country while domiciled in a neutral

country is freed from the restrictions attaching to alien enemies and further if he is and remains domiciled in the United Kingdom or any of its dominions, he is entitled to full rights of intercourse with British subjects or to sue in British Courts, but is prohibited from holding intercourse with his own compatriots (*Janson* v *Driefontein Consolidated Mines Ltd.*, 1902, A. C. 464). That position has been doubted, but it appears to be based upon an implied licence to remain or trade. It would be difficult to hold that, after being registered and allowed to remain, an alien could not even earn his living. In the Crimean war, however, a Russian resident in England, who did not deny a plea that he was there without the licence of the Queen, was not allowed to sue in an English Court, but if he had alleged such licence and had proved an implied licence, it seems it would have served his purpose (*Alcinous* v. *Nigreu*, 1854, 4 E. & B., 217).

It has been said that unlike civil domicile, commercial domicile is a mere temporary character, and may be abandoned and avoided. Thus at the will of the party concerned if a British subject, ally or neutral, whose domicile at the commencement of the war was of an enemy character, takes active steps to remove himself and his business to a friendly or neutral country, he will put an end to his enemy character (*Antoine* v. *Morshead* 1816, 6 Taunt. 329; *Willison* v. *Patteson*, 1817, 7 Taunt. 449; the *Virginia*, 1798, 1 Ch. Rob. 15; the *Gerasimo*, 1857, 11 Moo P. C. 88). But it seems that if a natural-born enemy domiciled in the enemy-country charges his domicile after the commencement of the war, he will be very readily presumed to have re-acquired for the purpose of trade a hostile domicile (*The Virginia*, 1804, 5 Ch. Rob. 98).

When a person having a domicile in an enemy country has a branch, or house of business, or is a partner in a firm in a neutral country, such branch or house of business or his interests in the firm will be treated as of a hostile character, and the share appertaining to the enemy partner will be liable at sea to seizure and condemnation, for the individual in such a case is

an enemy, and that affects all his property although the proclamation of September 1914, Cl. 17, makes an exception of dealings with the branch of an enemy house situate in British, allied, or neutral territory, *not being neutral territory in Europe*. At Common Law, where a neutral by domicile has a branch, or house of business in an enemy country, only the property belonging to or connected with the house of business or branch in the enemy country will be treated as of enemy character, the rule of non-intercourse or the condemnability of property will not apply to the property used in connection with the neutral business. In this case, the owner is not an enemy, but his business is, so far as it is carried on in the enemy country, since it affords support to the enemy (The *Vonge Klassina*, 1804, 5 Ch. Rob. at p. 302; the *Portland*, 1800, 3 Ch. Rob. at p. 43; the *Freudschaft*, 1819, 4. Wheat., 105). A passage from Lord Lindley's speech in the House of Lords in the well-known South African case of *Janson* v. *Driefontein Consolidated Mines, Ld.*, 1902, A. C. 484, makes the position quite clear. It runs thus: "An Englishman carrying on business in an enemy country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts" (*M'Connell* v. *Hector*, 1802, 3 B & P., 113). Again, also "the subject of a state at war with England, but who is carrying on business there or in a foreign neutral country, is not treated as an alien enemy; the validity of his contract does not depend on his nationality, nor even on what his real domicile, but on the place or places where he carries on his business or businesses," (*Wells* v. *Williams*, 1 Ld. Raym. 282; 1 Salk., 46).

The above statements in regard to residence or commercial domicile determining the enemy character are in accordance with the law of the United Kingdom of Great Britain and Ireland and the United States of America. A different rule is, however, adopted on the Continent of Europe (except in Spain and Holland). There nationality is treated as the test of the enemy in war. Accordingly persons whose birth gives them an enemy character, even if long resident in British territory,

may find our commercial allies treating them are alien enemies for the purposes of trade.

3. *Establishment of the house of trade in the enemy country*:—A company incorporated in enemy territory and carrying on main business there derives its national character from the State where it has been incorporated. So that a company incorporated in enemy territory is an enemy company, irrespective of the nationality or domicile of the individual members thereof (*Cf.* The cases of the *English Roman Catholic Colleges and the Irish Roman Catholic Colleges in France* in 2 Kn., 51, where it was held that corporations pursuing their operations in France and incorporated there could not claim to be British institutions, notwithstanding the fact that they consisted of British subjects). Much to the same effect is the German Code of Civil Procedure, sec. 19, which says: "The court of general jurisdiction for communities, corporations, and all companies, associations or other combinations of persons, and all foundations, establishments, and collections of assets or property, which can be sued as such, is determined by their seat. Unless some other seat is plainly discoverable, the the place where the management of the concern is carried on is held to be the seat." The Belgian Statute of May 18, 1873, Art. 129, contains a provision which is also essentially the same with respect to the incorporation of a company. The locality of the head establishment is always to be taken to decide the domicile.

4. *Joining the forces of the enemy*:—All persons, whether subjects of the hostile State or not, who become enrolled in the enemy's forces or assist them in the prosecution of the war are enemies. Under this category also fall those who are commonly known as "foreign spies" who by giving information or by acts of violence seek to aid the enemy.

5. *Traffic or trade with the enemy*:—The practice of trading or trafficking with the subjects of the belligerent State at the time of war has always been considered most objectionable and declared to be penal. Law has uniformly laid down that those who will resort to such a practice will be treated as enemies.

It should be noted that enemy character attaches also to all in the service of the enemy even in a civilian capacity, and although these may not be subjected to the violence allowed in war, they are liable to arrest and detention and to the civil and commercial disabilities of alien enemies.

But it has been declared by the Hague Convention of 1907 that the furnishing of supplies or the making of loans by a neutral to an enemy will not constitute a hostile act or service creating the neutral an enemy.

It will not be out of place to mention here that the Aliens Restriction Act, 1914, 4 and 5 Geo. 5, C 12, gives to His Majesty power by Order in Council to impose restrictions on aliens, and by Orders in Council dated 6th, 10th, 12th and 20th August and consolidated by an Order of 9th September, 1914, these restrictions are declared. By a Proclamation of 8th October, 1914, alien enemies are forbidden to change their names or to use any name other than that by which they were known at the beginning of the war.

It is with regard to sea-borne traffic, it has been said, that some modification of enemy character occurs. It is simply impossible, for personal reasons, that the general capacity and status of alien enemies should have depended on where they lived and carried on business. From the point of view of all but Prize Law the alien enemy is the person who owes political allegiance to the enemy Sovereign. But in Prize Law there is a modification. The enemy character of property in that law is determined, not by nationality, but by *domicil*, and there are also some loose dicta to the effect that if a man is a merchant of two countries he must be regarded as a subject of each with respect to transactions respectively originating there. (Cf. T. Baty, *Trade Domicil in War*,' in the Journal of Comparative Legislation, August 1908, and J. Westlake's, '*Trade Domicil in War*' reply to above, ibid, April 1909.)

Chapter IV.

Intercourse with Alien enemies—General observations—Trading with the enemy prohibited except without licence from the Crown—Origin and meaning of the prohibition—Historical reasons therefor—Exceptions.

It is interesting to note at the outset that there are two antagonistic principles recognized in practice relating to the subject of trading with the enemy.

Some States by their Municipal law prohibit by special and distinct orders all trading with the citizens of an enemy State as soon as war breaks out. In those States trade with the citizens of an enemy state is permitted *unless and until expressly prohibited.*

In other States, as in Great Britain, the Municipal law of the country,—the body of laws, which is known to the English Jurists as the Common Law of England,—declares that trade with the citizens of an enemy state is prohibited immediately on the outbreak of war, though the King, through his Ministers of State may allow all trade or certain classes of it to continue with the citizens of the enemy State by means of licences to trade. In States in which this rule obtains trade with the citizens of an enemy State is prohibited *unless specially permitted.*

Below are indicated the two well recognised principles on which the rule against intercourse has been based according to the eminent Prize Court Judge Sir William Scott.

"First, according to English law and constitution, the Sovereign alone has the power of declaring war and peace. He alone, therefore, who has this power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals

to determine on the expediency of such occasions, on their own notions of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy and on consideration of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted and under what regulations. In any opinion no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Secondly, no other principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation existing between the two belligerent countries; and that is, the total inability to sustain any contract, by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, ...The peculiar law of our country applies this principle with great rigour . No man can sue (in British Courts) who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*: but otherwise he is totally *ex lege*..... ...A state in which contracts cannot be enforced cannot be in a state of legal commerce." Again in the words of the authority just quoted "if the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a Court of Justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction, they have no legal evidence; and the whole of such commerce is attempted without its protection and against its authority." Bynkershoek expresses himself with great force upon this argument in his first book, chapter VII, where he lays down that legality

of commerce and the mutual use of Courts of Justice are inseparable. Upon these and similar grounds it has been the established rule of the law that trading with the enemy except under a Royal licence subjects the property concerned to confiscation.

The judgment in which the above observations were made (cf. the *Hoop*, I Ch. Rob., 169) was delivered over a century ago and inculcated principles which were approved by the House of Lords in the case of *Janson* v. *Driefontein Consolidated Mines*, 1902, A. C. 484.

It follows from what has been said before that no sooner does war between two countries begin than all intercourse between the subjects of the warring-countries ceases. This is the basis of the doctrine of non-intercourse so freely used in this connection. And that is in fact the prime idea which is to be borne in mind while on this subject. "This," says Professor Westlake, "stated broadly, is that the right of action by enemy subjects on existing contract is suspended, that commercial intercourse with enemy subjects is prohibited, and that as a consequence, no new contracts can lawfully be made between the subjects of mutually enemy states except in certain special cases, such as, that of ransom bills etc., technically known as "*commercii belli*" (cf. Westlake's International Law, Pt. II, 2nd Ed. p. 48). Lord Stowell in giving his judgment in the *Hoop* (1 Ch. Rob., 196) enunciated the principle of law on this point also and stated the reasons there for as follows: "In my opinion there exists a rule in the maritime jurisprudence of this country by which all trading with the public enemy, unless with the permission of the Sovereign, is interdicted." The same rule is laid down also in the jurisprudence of the United States in the following terms: "It is unlawful to have connection or to trade with the enemy" and accordingly a commercial partnership between an American and an alien enemy was held to be *ipso facto* dissolved by the existence of war (*Griswold v. Waddington.*, 1818, 16 John., 438). To a similar effect are Lord Lindley's remarks, 'War produces a state of things giving rise to well-known special

rules. It prohibits all trading with the enemy, except with Royal Licence and dissolves all contracts which involve such trading" (*Janson* v. *Driefontein Consolidated Mines, Ld.*, 1902, A. C. at p. 509). Also Blackstone in his Commentaries, Vol. I, 21st Ed., at p. 372 says: 'Alien enemies have no civil rights or privileges unless they are here (England) under the protection and by the permission of the Crown' and hold that they could not enforce their civil rights as plaintiffs. It is found that Coke, Littleton and Bracton viewed with disfavour the allowance of an action to alien friends, suggesting thereby prohibition of all intercourse during the pendency of a war (cf. Pollock and Maitland's History of English Law). But it must be noted that the prohibition at Common Law of intercourse with an alien enemy is not limited to commercial intercourse or trading, but includes all intercourse which could tend to the detriment of the British or to the advantage of the enemy and accordingly enemy shareholders have no right of voting in respect of shares in a British company during the war, and even the employment of a British subject as proxy to exercise the voting power is a prohibited intercourse between him and the alien enemy (*Robson* v. *Premier Oil and Pipe Line Co., Ld.*, 1915, 2 Ch. 124 C. A.; *London and Northern Estates Co.* v. *Schlesinger*, 1916, 1 K. B., 20). Commercial intercourse is not confined to making contracts between an alien enemy and a British subject, and a transaction directed to obtain the control of a trading company has been held to be commercial (*Robson* v. *Premier Oil and Pipe Line Co., Ld.*).

The general rule by which contracts entered into during a war between British citizens and the citizens of the enemy State are illegal and can never be enforced, applies to all contracts, and not only to those in the nature of a trading venture. An instance of this is to be found in the case of *Willision* v. *Patteson* (1817, 7 Taunt., 439). Patteson & Co., who were London merchants, were the holders of some cambric, the property of a Frenchman in Dunkirk. The owner of the cambric drew a bill on Patteson & Co., who accepted it, and the bill was then endorsed for value to Willison, a British

subject, who also resided in Dunkirk. At the time the bill in question was drawn, accepted and endorsed, France and England were at war. When the action was brought peace had already been restored. It was held that the plaintiff company was not entitled to recover. Contracts made in furtherance of illegal trading, even though not made directly between the citizens of two belligerent States, are illegal and void. Another instance is to be found in the case of *Potts* v. *Bell*, (1800, T. R. 548). Bell, a London merchant, purchased certain goods in Holland and shipped them on board a neutral ship at Rotterdam for conveyance to Hull. Holland was then at war with England. The ship cleared from Rotterdam for Norden because the authorities in Holland would not permit the vessel to be cleared in any port in Great Britain. The firm of London Insurance brokers, Barrett, & Co., effected an insurance on the cargo on behalf of Bell. The policy was subscribed to by Potts on behalf of the Insurance company. The ship was captured by the French the day after she sailed. In an action brought by Bell on the policy judgment was given in his favour. That decision was reversed on appeal. It was then held that he was not entitled to recover, on the ground that it was a principle of Common law that trading with an enemy without the King's licence was illegal in British subjects and every contract of indemnity against the risks attendant on such trading was also illegal.

Investigation and experience prove that the ground is one of expediency based on the danger of unrestricted communication with the enemy. In English law, the earliest enunciation of a this subject was stated by Lord Mansfield, in *Gist* v. *Mason*, in a short note in 2 Ro. Abr., 173, where a trading with Scotland, then in a state of general enmity with this country was held to be illegal; and the other was also a note, now lost, which was given by Lord Hardwicke of a reference in King William the Fourth's time to all the Judges, whether it was a crime in Common law to carry corn to the enemy in time of war, who held that it was a great misdemeanour.

Grotius does not refer to commercial advantage as the foundation of the rule, but attributes it to the national duty of the subject (III. c. 22, sec. 5). The French Valin follows him in this opinion (III vi, sec. 3,7). Such was also the law in Spain as we find from the decision of the Hoop. Also, Chitty, an early English legal writer, alludes to the fact that trading affords aid to the enemy, by enabling the merchants of the enemy's country to support their Government. 'Export duties,' he adds, 'are to be paid which is furnishing the very sinews of war to the hostile Government (cf. *Law of Nations*, London, 1812). But Chitty's speculations have no judicial authority and are only interesting as having possibly furnished materials to the Judges for their decision in *Esposito* v. *Bowden* (1857, 7, E. & B., 763).

The earlier decisions which were based on the prohibition of trade all emanate from Prize Courts and therefore only concern the special rules of Prize law. The first case of general importance is *Potts* v. *Bell* (1800, 8 T. R., 548), referred to above, in arguing which the King's Advocate made the following statement of the principle: —

'War puts every individual of the respective Governments, as well as the Governments themselves, into a state of hostility with each other. There is no such thing as a war for arms and a peace for commerce. In that state all treaties, civil contracts and rights of property are put an end to.....Now trading, which, supposes the existence of civil contracts and relations, and a relation to Courts of Justice, and the rights of property, is necessarily contradictory to a state of war. Besides it is criminal in a subject to aid and comfort the enemy; and trading affords that aid and comfort in the most effectual manner by enabling the merchants of the enemy's country to support their Government.'

The cases referred to below show that this statement goes much too far, and that the same remark applies to the theoretical rule, which is still sometimes put forward, that claims which cannot be enforced by alien enemy owing to the prohibition of intercourse are subject to confiscation. Such a rule has never

been applied in practice in Great Britain. It was repudiated in *Wolff v. Oxholm*, (1817, 6 M. & S., 92) as contravening rules of International Law. Lord Ellenborough in this case referred to the statement in Sir Mathew Hale's Pleas of the Crown, Vol. I, p. 95, to the effect that the debts and goods found within the realm belonging to alien enemies belonged to the King and might be seized by him, and declared that the books on which Hale relied did not mention a single case in which such a confiscation had occurred, and also did not adduce a single judgment recognizing the lawfulness of such confiscation. Lord Alvanley took the same view as the noble Lord in *Furtado* v. *Rogers* (13 B. & P., 14.) It must be said in passing that the correctness of Ellenborough's statement has sometimes been disputed but that only in theoretical arguments (cf. the argument of Hale at pp. 443-445). Dr. Oppenheim is of opinion that according to presentday views no confiscation would be admissible. (p. 102).

In the famous decision of the *Hoop*, (1799, 1 Ch. Rob., 196) the above rule was declared to have been a general principle of law in most of the countries of Europe and was placed on the ground of the suspicious nature of such intercourse. "Who can be insensible", Sir William adds, "to the consequences that might follow if every person in time of war had a right to carry on commercial intercourse with the enemy, and under colour of that had the means of carrying on with him other species of intercourse he might think fit." Sir William also alludes to the argument drawn from the impossiblity of admitting enemies to sue in the courts. But he says nothing about crippling the enemy's trade.

Communication with the enemy has been looked upon with disfavour in the Black Book of the Admiralty (cf. Twiss' *Law of Nations*, p. 188, sec. 58). A licence to trade in Scotland is found as early as 13 Ed. II (2 Ro. Abr., 173, fol 3). Thus the British declaration of war against Spain in 1762 (cf. Twiss' *Law of Nations*, 85, sec. 45) strictly forbids all British subjects to hold any correspondence or communication with the said King

of Spain or his subjects: a prohibition again and again respected in such proclamation. 'Every relaxation of the rule,' says the famous American Jurist Kent (Comm: i: 67), 'tends to corrupt the allegiance of the subject and prevents the war from fulfilling its end. ..... To suffer individuals to carry on a friendly or commercial intercourse would be placing the acts of governments and the acts of individuals in opposition to each other. It would counteract the operation of war, and throw obstacles in the way of the public efforts, and lead to disorder, imbecility and treason. Trading supposes.....a reference to courts of justice: it is therefore necessarily contradictory to a state of war. It offers aid to the enemy country in an effectual manner by enabling the merchant of the enemy's country to support their government, and it facilitates the means of conveying intelligence, and carrying on traitorous correspondence with the enemy. It follows as a necessary consequence of the illegality of all intercourse or traffic, that all contracts with the enemy made during war are utterly void..... It is also a further consequence of the inability of the subjects of the two states to commence or carry on any correspondence or business together, that all commercial partnerships..... are dissolved by the mere force and acts of the war itself; though other contracts.....are not extinguished, but the remedy is only suspended, and this from the inability of the enemy to sue.' But it has been held in *Andrew, Millar & Co. v. Taylor & Co. Ld.*, (1916, I. K. B., 402) that in a contract for sale of goods for export, if war intervened and a temporary embargo was put on exportation of goods, thereby making the performance thereof impossible, the contract could not be said to have been annulled.

There is also ample authority shewing that agreements between subjects of belligerent States are not made void by the outbreak of war, but that the enforcements of the rights arising therefore is only suspended while the war continues (*Ex parte Boussmaker*, 1806, 12 Yes., 71).

Thus broadly speaking all trade with the enemy is illegal. The circumstance that the goods are to go first to a neutral

port will not make it lawful. The trade is still liable to the same abuse, and to the same political danger whatever that may be. The prohibition is not one striking at the enemy's commerce and resources at all. It is the fact of the communication that is the important factor. So in *Antoine* v. *Morshead*, (1815, Taunt., 238) Lord-Justice Gibbs says that to draw a bill on an enemy gives rise to a communication between subjects of both countries, which ought to be avoided. For a similar reason a contract even between British subjects may be discharged because it cannot be fulfilled without intercourse with an enemy population, as demonstrated in the well-known case of *Esposito* v. *Bowden* (1857, 7 E. & B., 763.) The case is not a direct authority in favour of the contention that it is the danger of the personal intercourse rather than the desire to improve the enemy's trade or any abstract theory of enmity between private persons or different nations, that is the decisive factor, because it was finally decided on the flimsy ground that all export involved a benefit to the State of export in the shape of harbour charges and custom duties.

The idea that it is the augmentation of the enemy's resources by trade which is the objectionable thing in trading with the enemy scarcely appears at all until the middle of the 19th century. This fact was briefly alluded to (but only in the arguments of counsel) in *Potts* v. *Bell*, (8 T. R., 548) but not until 1854 is it prominent in the judgments of Courts. In *Kershaw* v. *Kelsey* (1868, 100 Mass., 572) the judgment is for the first time exclusively and deliberately placed on that ground. The Law of Nations is there declared to prohibit only that intercourse with the enemy which involves submission to or protection by his forces or which tends to increase his resources. Neither Bynkershoek nor Valin, had any idea of the kind. Chancellor Kent, in deciding *Griswold* v. *Wadlington* (1818, 16 John., 428) says nothing about commercial advantages. "There is," he says, "no intercourse allowed on the obvious dictates of reason, as well as the plainest deductions of public policy. If individuals

could carry on a friendly intercourse while the Government was at war, the act of Government and the act of individuals would be contradictory. Such a principle is certainly the parent of disorder, it inculcates contempt of law; it throws obstacle in the way of public efforts" (16 John. at p. 447). Also "there is no authority in law for any kind of private, voluntary, unlicensed business, commerce or intercourse with the enemy. It is all noxious, and in a greater or less degree it is all criminal. There is wisdom and policy, patriotism and safety in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and prolong the calamities of war" (*ibid.* p. 483).

The American Supreme Court in 1868 (cf. *Coppel* v. *Hall*, 7 Wall., 557) again adhered to the ancient principle grounded on the danger of intercourse. If commercial intercourse were allowable it would often times be used as a colour for intercourse of an entirely different character, and in which case the mischievous consequences that would ensue can be readily foreseen (the sole ground taken in *U. S.* v. *Lane*, 8 Wall., 195; see also *U. S.* v. *Grossmayer*, 1869, 9 Wall., 74). So again the Court of Louisiana held in 1868 that 'it would be dangerous for any nation to permit that degree of intercourse to be carried on, which must necessarily result from trading or commerce. It would certainly interfere with the secrecy, certainty and despatch of military operations without which any war could not successively be carried on.' (*Harman* v. *Gilman*, 20, La. Ann., 242).

On similar principles as the above participation of a British subject in a loan to the enemy during a war is illegal as being an aid to the enemy (*Netherlands South African Railway Co.* v. *Fisher*, 1901, 18 T. R., 116; *Janson* v. *Driefontein Consolidated Mines, Ld.*, 1902 A. C., 490; *Potts* v. *Bell*, 1800, 8 T. R., 548; *Brandon* v. *Nesbitt*, 1794, 6 T.R., 28). It has also been declared by the Proclamations of 5th and 12th August, 1914, that any such participation or any dealing with the enemy, their Emperor or their Government or otherwise aiding, abetting or assisting

them is High Treason on the part of our subjects or persons resident or being our Dominions. So the Prussian Court in 1871 held that the participation by the German Banker Guterbock in the French War Loan, known as the Morgan Loan, was not only illegal but treasonable. But it will not be improper to mention here that in regard to public loans effected before a war the debtor Nation adopts the principle that the debt should be recognised and interest paid even to alien enemies during the war, the reason being that recognition of any other principle would greatly hinder the raising of foreign loans in times of peace. This principle has been maintained since 1752 when the controversy about the Silesian Loan raised that question between England and Prussia.

From the numerous instances which have been adduced and the slender mention which is made in them of the benefit accruing from the interruption of commerce it may be inferred that the prohibition of trade with the enemy was grounded on the supposed dangers of intercourse alone. It may equally be said that the real ground of the prohibition of contracting with the enemy and of entertaining suits by the enemy, is none other than this. This is what Dr. Baty observes on the point, "Evidence has been adduced to show that the rule as to invalidity of contracts with the enemy, and the suspension or dissolution of contracts made prior to the event of war, is derived mainly, if not entirely, from the danger and impossibility of permitting intimate intercourse between the subjects of the enemy States. That it is not derived from any abstract theory of individual hostility, nor (as mistakenly supposed in most cases) on any imagined benefits of suppressing the enemy's trade, even when conducted with ourselves. It is further suggested that in the complex circumstances of the modern world this intimacy of intercourse, in the great majority of transactions, no longer subsists. The conclusion appears to be that, except in peculiar cases, where the interest and duty of a private individual would be brought into conflict, or where personal intercourse is still necessary, the prohibition of making or performing

contracts with enemy persons is no longer, as a matter of policy, reasonable or maintainable" (Cf. the Law Quarterly Review, Vol. XXXI, 1915, Jany. No. p. 49).

The above may be said, without fear of being gainsaid, to be the latest opinion on the point.

It is surely to be doubted that the origin of the rule prohibiting trade with the enemy was neither the abstract notion of the impossibility of any jural relation between enemies, nor the modern notion of the injury which can be inflicted upon a country by declining to trade with it. A close examination of the case-law on the subject discloses the fact that the origin of the rule lay in the danger of permitting unauthorized communication with the enemy. The danger is two-fold; it facilitates treason; it engenders leakage of information.

The conclusion is therefore that as trading with the enemy means any sort of intercourse with him, such intercourse is prohibited at Common Law after the declaration of hostilities except under a licence from the King. That it will be useful to note in this connection the following passage from Baty and Morgan's Book—*'The War: Its Conduct and Legal Results.'* "Trading with the enemy is spoken of and legislated about as though it means all commercial transactions instead of being a technical term for transport. Sweeping assumptions have been made that all such transactions are penal, in apparent ignorance of the absence of conclusive authority to that effect, and the fact that the Georgian legislation imposed only very light penalties on the insurance of enemy ships." (cf. Preface, pp. xii—xiii).

The doctrine of prohibiting trade with the enemy is quite distinct from the rule which dissolves or suspends contracts with the enemy (*The Rapid*, 8 Cr. 163) and appears to be the more modern. A clear intimation of it is obtained from Bynkershoek. Of course in the 16th and earlier centuries, an attempt at total prohibition of trade with the enemy had frequently been made. Thus Queen Elizabeth, in 1586, proclaimed an absolute general order against trade with the Dutch on the part of any nation—what would now be called a 'proper blockade.' Such pretensions

existed during the 17th century in the qualified institutions of blockade and contraband. Neutrals needed not to submit to the wholesale interruption of their commerce with their customer. But as regards the subjects of belligerents, they had to submit to the ordinances of their own sovereigns and it became generally recognised that trade between the belligerent countries was impossible. Bynkershoek gives the principal reason therefor the great danger and difficulty which foreign merchants ran in a hostile country.

In the cases decided by the great masters of Prize Law the benefit to accrue from the destruction of trade with the enemy has never been urged as the ground of the rule. It has on the other hand been put on the ground of allowing intimate intercourse. Thus American Chancellor Kent says (Comm: i. 66) "It facilitates the means of conveying intelligence and carrying on traitorous correspondence with the enemy. It is difficult to conceive of a point of doctrine more deeply or extensively rooted in the general maritime law of Europe, and in the universal and immemorial usage of the whole community of the civilised world. To suffer individuals to carry on friendly or commercial intercourse while the two Governments went at war would be playing the act of Government and the act of individuals in contradiction to each other. It would counteract the operations of war, and throw obstacles in the way of the public efforts and lead to disorder, imbecility or treason. The idea that any commercial intercourse or pacific dealing can lawfully subsist between the people of the powers at war.....is utterly inconsistent with the new class of duties growing out of a state of war.'

Similarly, in the course of his judgment in the *Rapid*, (1814, 8 Cr. 55) Johnson, J. held that "The universal sense of nations has acknowledged the demoralising effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. If by trading, in Prize Law, was meant that signification of the term which consists in negotiation

or contract, this case would certainly not come under the penalties of the rule. But the object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation or contract, therefore, has no necessary connection with the offence. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed." The Court admitted that it was a hard case, but it must be borne in mind, as so felicitously observed by Story, J., that "*it is the unenvied province of the Court to be directed by the head and not by the heart.*"

It will be useful to summarise briefly the facts of the decision of the *Rapid* in order to form a full comprehension of the principles thereof. In that case a native American's agent has hired the *Rapid* in Boston to proceed to Indian Island, a British station on the borders of Nova Scotia, to bring away goods which his principal had purchased and stored there. She was captured and her cargo was condemned, because war had already broken out between Great Britain and the United States, as the bringing away of the goods would have meant commercial enrichment of the enemy.

Sir William Scott asserts precisely the same doctrine as that of the *Rapid* in general terms in the *Cosmopolite* (1801, 4 Ch. Rob., 8) where he says "It is perfectly well-known that by war all communication between subjects of the belligerent countries must be suspended and that no intercourse can legally be carried on between the subjects of the hostile states." And in the better known case of the *Hoop* (1801, 4 Ch. Rob., 165), as has already been noticed, he puts the interdiction of commercial intercourse on the ground of its giving colour for other kinds of intercourse.

Another Prize Court authority, Nelson, J., concludes to the same effect as Sir William when he observes that on war—: "The people of the two countries immediately become the enemies of each other; all intercourse, commercial or otherwise, unlawful; all contracts existing at the commencement of the

war suspended and all made during its existence utterly void." (*The Prize Cases*, 1862, 2 Black., 635, 687).

It is worthwhile to note that in the (*Julia* (Luce) 1813, 1 *Gell.*, 594) Story J., an eminent American Prize Court authority, in adopting the observations of the Massachusetts circuit Judge, carefully examined the proposition that intercouse not commercial might proceed in time of war between belligerents. Neither Bynkershoek nor Valin, he concluded, had any idea of the kind. The following is the text of some of his observations: "I lay it down as a fundamental proposition that, strictly speaking, in war all intercouse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the Government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse.....Independent of all authority, it would seem a necessary result of a state of war, to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every efforts of his own to assist his own Government and to counteract measures of his enemy....No contract is considered as valid between enemies at least so far as to give them a remedy in the courts of either Governments; and they have in the language of the civil law, *no persona standi in judicio*. The ground upon which only trading with the enemy is prohibited, is not the criminal intentions of the parties, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice."

The first occasion, on which the doctrine of military benefit to a belligerent of cutting off the enemy's trade with it was explicitly urged, appears to have been the case of *Brandon* v. *Nesbitt*, 1794, 6 T. R., 23) in which the Counsel for the Crown

put it strongly forward. But it unfortunately failed to have had any weight with the court.

It is not until the decision of *Esposito* v. *Bowden* (1857, 7 E. and B., 763) that much stress was laid on the importance of damaging our trade with the enemy. In that case the question was whether the performance of a contract to load a cargo of corn in a neutral ship at Odessa for Falmouth was rendered illegal by the outbreak of war with Russia. It was held that it ought to be so. But language was used by the Exchequer Chamber laying stress on the mercantile dealings with the Russians, which the performance of the contract would involve. The payment of export duties would have supplied the enemy directly with the means of carrying on the war. Stress was thus laid, not on the broad fact of transit from Russian territory to English, but (1) on the assumed dealings with Russians, and (2) on the advantage to Russia accruing from the payment of export duties or other incidental charges.

So also in *Kershaw v. Kelsey* (1869, 27 Am. Dec., 124) Gray, J. holds that only such intercourse is prohibited as involves submission to, or protection by the enemy, or tends to increase his resources (including all commercial intercourse). It is submitted that these isolated dicta, not enunciated by Prize Judges, are founded on a misapprehension and that it is clear from the decision of the *Rapid* that all trade is prohibited without the slightest regard as to whether it is in itself a benefit to the enemy or not.

The treatment of this part of the topic would remain incomplete if mention were not made in this connection of the cognate principle of law of a less politic nature but equally general in its reception and application. That is the principle which forbids communication between subjects of enemy subject as inconsistent with the relation at that time existing between the two countries, and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue or to sustain, in the language of civilians, *a persona standi in judicio*

The English law applies this principle with great rigour. No man can sue in the British Courts who is a subject of the enemy unless under peculiar circumstances for the time being he is discharged from that character.

The intercourse with alien enemies which is forbidden is not only commercial intercourse, but also any communications which might result in advantage to the enemy, or in detriment to this country. Sir William Scott went so far as to lay down that "all communications between the subjects of the belligerent countries must be suspended and no intercourse can legally be carried on between the subjects of the hostile States, but by the special licence of their respective Governments (*The Cosmopolite*, 4 Ch. Rob., 11.) Generally speaking, therefore, a licence from the Crown will create an exception to the general rule. An exemption will be created in favour of the alien enemy no less in the case of the British subject if they have secured a licence to trade with each other. Licences from His Majesty to trade may be either *general*, that is, licences to all British, or neutral or enemy subjects to trade in particular articles or at particular places; or *special*, that is, to individuals to trade in a particular manner, express or implied (*Feize* v. *Thompson*, 1 Taunt., 121; *Vandyck* v. *Whitmore*, 1 East., 475). For examples of licences granted during the war, reference may be made to the licences granted to German and Austian Banks on 19th September, 1914, and to Turkish Banks on 30th November, 1914 and on 8th January, 1915.

Chapter V

What is the general Effect of War on Contracts made with alien enemies during existence of War—General statement of the law—Exceptional cases: (*a*) Licensed Contracts; (*b*) Ransom Contracts (*c*) Contracts of Necessity with Prisoners of War; (*d*) Contracts with Alien enemies residing or trading in British or Neutral territory; and (*e*) Contracts not of commercial or financial nature.

Generally speaking war affects different contracts in different ways; some are wholly avoided or dissolved; while others are rendered unenforceable for the time being; others, again, remain unaffected. The particular conditions of each contract, namely the enemy or friendly character of the party or parties, materially affect the consideration of each case; the time when it was entered into, *i.e.* whether before or after the outbreak of war, its nature *i.e.* whether executory or executed, the possibility or impossibility of the performance during a state of war.

The main principle underlying this branch of the law is that all intercourse with an alien enemy is to be stopped altogether (except that under licence from the Crown). The general rule is that contracts made with alien enemies during the existence of war and particularly, if not exclusively, transactions, which are tantamount to trading with the enemy, are illegal and void and cannot be enforced in a British Court of Justice. The earliest authority on this point is Brandon *v.* Nesbitt, 1794, 6 T.R., 23, the later authorities being Willison *v.* Patteson, 1817, 7 Taunt, 459 and Clementson *v.* Blessig, 1855, 11, Exch., 135 and the latest being Janson *v.* Driefontein Consolidated Mines, Ld., 1902, A. C. 484.

Chancellor Kent says as follows: "The law has put the sting of disability into every kind of voluntary communication and contract with an enemy which is made without the special permission of the Government. There is wisdom and policy, patriotism and safety, in this principle, and every relaxation of it tends to corrupt the allegiance of the subject and prolong the calamities of war."

How contracts made with alien enemies are variously affected by war may be summed up as follows:—

(*a*) Contracts made during the war without a licence are rendered void;

(*b*) Contracts made and executed before the commencement of war; if lawful *per se*, are suspended during the war. The rights and remedies thereunder revive after the war is over (subject to the Statute of Limitations);

(*c*) Contracts made before the war, but wholly or partly executory at the outbreak of hostilities are void either (i) if illegal *per se*; or (ii) if the contract is indivisible, and might fail in its purpose; if performance were to be suspended during the war.

On the other hand, an executory contract, otherwise lawful will be suspended and not rendered void by the outbreak of war, if its object can reasonably be effected by performance after the war, while, if such a contract be severable, it will be void as to such parts only as cannot reasonably be performed after the war and its operation will otherwise be suspended.

The doctrine of non-intercourse above referred to has two branches:—

(1) In regard to contracts with alien enemies made before the war no further performance is allowed and no action can be brought during the war: and

(2) New contracts with alien enemies made during the war are wholly void and cannot be sued upon either during or after the war.

There is a third proposition which arises by way of necessary corollary to the preceding two, namely:

(3) Any contract tending to support the enemy or favouring his trade during the war is void.

Thus in the words of Lord Davey, "No action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government," and in those of Chief Justice Gibbs, "A contract made with an alien enemy in time of war of such a nature that it endangers the security or is against the policy of this country, is void." Such are policies of insurance to protect the enemy's trade (Antoine *v.* Morshead 1815, 6 Taunt., 332) In this category would fall the participation of a British subject in a loan to the enemy's Government in the time of war.

There are some contracts which prove exceptions to the general rule outlined above. They are, (*a*) licensed contracts; (*b*) ransom contracts; (*c*) contract of necessity with prisoners

of war; (*d*) contracts with alien enemies residing or trading in British or neutral territory; and (*e*) contracts not of a commercial or financial nature.

Licensed Contracts:—As has already been pointed out as a general rule all contracts made or purported to have been made with alien enemies in time of war are void *mala prohibita*. But the King, who has the inherent right to declare war and make peace, may will otherwise and direct that such contracts as are not opposed to public policy, or prejudicial to the interest of the realm, but will tend to the benefit of his subjects, are lawful and exempt them by granting a licence direct, or causing a licence to be granted. Such contracts are known as licensed contracts and are considered legal and valid (the Hoop, 1793, 1 Ch. Rob., 196; Vandyck *v.* Whitmore, 1801, 1 East., 475).

Ransom Contracts:—Ransom contracts were formerly held valid in time of war. Thus in Ricord *v.* Bettenham, 1765, 3 Burr., 1734, an action upon a ransom bill given in time of war was sustained in time of peace. But no such action was maintained in time of peace (Anthorn *v.* Fisher, Doug. 649, note to Cornu *v.* Blackburn). In Furtado *v.* Rodgers, 1802, 3 B. and P., 191, it was observed by Lord Alvanley that no action was ever maintainable upon a ransom bill in a Court of Common Law until the case of Ricord *v.* Bettenham, and that he had the authority of Sir William Scott for saying that in the Admiralty Court the suit was always instituted by the hostage. The case of Ricord *v.* Bettenham, however, tended to show that such an action might be maintained in a Court of Common Law at the suit of an alien enemy. In consequence of this a similar action was brought in Cornu *v.* Blackburn, Doug. 641, and after arguments the Court of King's Bench held that it might be sustained.

But all these observations about ransom contracts have now become of academical interest only, inasmuch as by a Statute in 1782 (22 Geo. III., c. 25) ransom contracts were made illegal and void. The Crown has, however, reserved

the right to allow British subjects to ransom their property by an Order in Council (Cf. Sec. 15 of the Naval Prize Act, 1864).

Contracts of necessity with prisoners of war:—Contracts of necessity entered into during the continuance of war by prisoners of of war are valid and may be sued upon after peace has been declared. Thus, bills of exchange drawn by a prisoner of war for his own subsistence constitute an exception to the general rule by which all contracts made between subjects of belligerent states during the existence of war are void (Nelson *v.* Trigg, 3 Tenn. Cas., 733). In Antoine *v.* Morshead 1815, 6 Taunt., 237) a bill of exchange was drawn on the defendant in England by his father, a British subject detained prisoner in France during war. It was payable to two other British subjects also detained there. It was afterwards endorsed to the plaintiff, a French subject, who was a Banker at Verdun, and accepted by the defendant. The plaintiff was held entitled to recover on the bill after the declaration of peace, Gibbs, C. J. observing as follows: 'This is no bill of exchange drawn in favour of an alien enemy, but by one subject in favour of another subject, upon a subject resident here, the two first being both detained prisoners in France; the drawer might legally draw such a bill for his subsistence. After the bill is so drawn, the payee endorses it to the plaintiff, then an alien enemy. How was he to avail himself of the bill except by negotiating it and except to the inhabitants of that country in which he resided?' The principle undoubtedly is that there shall be no communication with the enemy in time of war, but in this case it is a contract between the two subjects of the enemy country which is perfectly legal. Thus Bills of exchange held by prisoners of war seem to be in an exceptional position in Common Law.

The Judge mentioned above had occasion to refer again to the above case in Willison *v.* Patteson, 1817, 7 Taunt., 439, as forming an exception to the general rule invalidating contracts during war with alien enemies, because of their being grounded on necessity.

The reason underlying the decisions in the above two cases is also the only possible way of reconciling the case of Daubez *v.* Nesbitt, 1764, 6 T. R. with the general principle that a party cannot sue in trust for an alien enemy (Brandon *v.* Nesbitt, 1794, 6 T. R. 23).

Contracts with alien enemies residing or trading in British or neutral territory :—

The principle that the enemy character is determined by domicil, a doctrine applied, as already observed, to the case of British subjects, who have a civil or commercial domicil in a neutral country, as also to the case of British subjects or neutrals residing or trading in enemy territory, would logically lead to the conclusion that alien enemies who have a civil or commercial domicile in a neutral state or in the British territory, should not be deemed to be such. In fact, the observations of Lord Lindley in Janson's case might lead one to adopt the view, but ordinarily the English decisions have not gone so far.

No case seems to have received judicial decision as regards a contract made during the progress of war with an alien enemy residing or trading in a neutral country, not being neutral territory in Europe. Such a transaction is not wholly forbidden by the Trading with the Enemy Proclamation, No. 2 of 9th September, 1914. Art. 6 of that Proclamation provides that where an enemy has a brand locally situated in British, allied, or neutral territory, *not being neutral territory in Europe*, transactions by or with such branch shall not be treated as transactions by or with an enemy; but where such branch carries on the business of insurance or re-insurance of whatever nature, transactions by or with such branch are deemed to be transactions by or with an enemy (cf. Art. 5 of the Proclamation relating to Trading with the Enemy dated the 8th October 1914). Contracts made during the pendency of the present war with an enemy residing or trading in neutral territory in Europe are therefore illegal and void. But the validity of contracts made with an enemy residing or trading in neutral territory outside Europe is still a doubtful matter. Such contracts, unless

they are of insurance or re-insurance, are not illegal in the sense of being criminal. They are probably valid for all purposes, except that they do not entitle an alien enemy to sue upon them during the present war. It is hardly possible to construe the permission as an implied licence of the Crown, which enables such enemies to sue. Whatever enabling value the Proclamation has, it is meant for British subjects only. The Proclamation does not prohibit transactions during this war with an enemy, resident or trading in British territory (cf. Arts. 3 & 6) except transactions of insurance or re-insurance (cf. the Trading with the Enemy Proclamation, 8th October 1914, Art. 5). Such transactions are not then illegal. But the same question arises as to the extent of the validity. In this connection several earlier English decisions of which Alcinous *v.* Nygren, 1854, 4 E. & B., 217 and Alciator *v.* Smith, 1812, 3 Camp., 244, may be prominently mentioned, are worthy of consideration. In Alcinous *v.* Nigren it was held that a person born in Russia, but domiciled in England, could not sue on a contract of service which he had performed before the outbreak of war between Russia and Great Britain on the ground that he was alien enemy. Similarly in Alciator *v.* Smith an action by the endorsee against the drawer of a bill of exchange was dismissed on the plea of an alien enemy, although the plaintiff, a French lady, had resided for a long time in London. It was also held in that case that even where an alien enemy was domiciled in the United Kingdom and had registered her place of abode in compliance with an Act, that did not amount to a licence to reside in the United Kingdom.

From the above cases it would appear that at Common Law if a contract was made in time of war with an alien enemy residing or trading in the United Kingdom such contract, however otherwise valid, would not be enforced by a suit at the instance of the alien enemy during hostilities, unless he had the express or implied licence of the Crown to trade or reside in the Kingdom. It may be possible to construe the Trading with the Enemy Proclamation, No. 2 of 9th September 1914 together with Aliens Restriction Act, 1914, Orders in Council issued in virtue thereof as an

implied licence to this effect. However this may be the case of DeWahl v Braune, 1855, 11 Exch., 178, where the English wife of an alien enemy, who lived in England separately from her husband was barred from suing on a breach of contract of sale of a school, would no longer present difficulties. The status of a married woman has changed since then. Now a woman married to an alien can make a declaration that she desires to retain her British nationality. Thereupon she will be deemed to continue a British subject (cf. British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. V, c. 15, S. 10 which came into operation on the 1st of January 1915). It is thus concluded that contracts falling within this fourth exceptional class, if otherwise valid, are enforceable by a British subject even at Common Law (cf. Robinson & Co. *v.* Continental Insurance Co. at Mannheim, reported in the *Times* of 17th October 1914).

In *Dorsey v. Kyle*, 1869, 96, Am. Dec., 617, it was also declared than an alien enemy might be sued at law though he would not sue, as neither reason, nor policy, forbade judicial proceedings against an alien enemy in favour of a friendly citizen. Sir Frederick Pollock seems to be of the same opinion (cf. Principles of Contract, 8th ed., p. 100) and points out that even alien enemies could enforce such contracts after the war had ceased. It is also possible that contracts made with alien enemies resident or trading in the United Kingdom are enforceable by them during the continuance of war by such modes of self-redress, as lien, or retention and appropriation of payments.

The Trading with the Enemy Proclamation, No. 2 of 1914 also seems to make such contracts valid in favour of and enforceable by British subjects (Arts. 3, 6 and 7). It may be further noted that Art. 7 of that Proclamation provides that nothing in the Proclamation shall be deemed to prohibit payments on account of enemies to persons resident, carrying on business, or being in the British dominions, if such payments arise out of transactions before the outbreak of war, or are otherwise permitted.

Contracts not of a commercial or financial nature :—The doctrine of non-intercourse between the residents in belligerent

states during war has so far been applied to commercial or financial contracts. The language of the judges in some cases is wide enough to cover every kind of contract, but it must, of course, be interpreted by a reference to the actual facts of those cases. It is also true that the Trading with the Enemy Proclamation, No. 2 which has a statutory force under the Trading with the Enemy Act of 1914 (4 & 5 Geo. V c. 87, Sec. 1 (1) warns all persons resident, carrying on business, or being in the British dominions, 'not to enter into any commercial, financial or other contract or obligation, with or for the benefit of the enemy *i.e.* any one residing or trading in enemy territory (Arts. 3, 5 and 9)'. A contract not of a commercial or financial nature, *e.g.* a promise of marriage, might be valid in favour of, and actionable at the instance of a British subject; and it might even be actionable at the instance of an alien enemy on the restoration of peace.

The language of Justice Gray in Kershaw v. Kelsey, 1869, 97 Am. Dec., 124, suggests a possible limitation of the above nature to the general rule of non-intercourse. In the course of his judgment he stated as a result of an exhaustive review of the principal American and English authorities on the subject that "the Law of Nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries; and this includes any act of voluntary submission to the enemy or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading, or commercial intercourse, whether by transmission of goods or money, or by orders for the delivery of either between the two countries, directly or indirectly, or through the intervention of third persons, or partnerships or by contracts in any form looking to or involving such transmission, or by insurances upon trade by or with the enemy."

"Beyond the principle of these cases, the prohibition has not been carried to any further extent by judicial decision..... At this stage of the world's progress when all the tendencies of

the Law of Nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their Governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

The following is the full text of what Messrs. Baty and Morgan say so luminously on the point under discussion: "Non-commercial contracts are unaffected by war. This principle rests on the assumption which, as we shall see, distinguishes a certain school of thought in the treatment of the question of trading with the enemy—namely, that the sole or principal object of the invalidation of enemy contracts is to prevent the commercial enrichment of the enemy. It was pointed out long ago by Lord Mansfield and others, that, since trade is reciprocal, traffic can never do more good to the enemy than to the home country. The true reason of the rule in both cases alike is, that commerce between the subjects of belligerents is risky, both to the individual who undertakes it and to the state which permits it. The foundation of the rule cancelling or suspending contracts is simply that it would be unfair to hold a person to a contract when he cannot appear and defend himself. Coolidge *v.* Inglee, 1816. 13 Mass., 26 is perhaps the earliest case in which the ground is taken. The case of New York Life Insurance Co *v.* Statham, 1818, 93 U.S., 29, is a strong authority in the opposite sense. A policy of life insurance is not a "commercial tranasction," any more than the term of an office." (cf. Baty and Morgan: The War: Its Conduct and Legal results; Chap. on Contracts with Alien Enemies, pp. 284, 285 and 286.)

Chapter VI

Executed Contracts made with Alien Enemies befere the outbreak of war.

An executed contract is a contract, which is wholly performed on one side only. If, for instance, a contract made before

war is executed so that a money debt has resulted, and no further act remains to be done which falls within the prohibition of non-intercourse, the debt is only suspended and revives at the end of the war; further if it is executed in part only, the obligation to execute it through is suspended during the war and revives after peace is restored. Thus, when a contract has been entered into with an alien enemy before the outbreak of war, and the performance is on his side, the general rule is that war only suspends his remedy, or in other words he cannot sue upon it during the existence of hostilities (Alcinous *v.* Nygreu, 1854, 4 E. & B., 317). Also, in *exparte* Boussmaker, 1806, 13 Vess., 71 it was decided that a dividend payable under a bankruptcy in respect of a debt due and payable before the outbreak of war to an alien enemy ought to be retained in hand for payment to him on the restoration of peace. If, however, an alien enemy is residing or trading in the United Kingdom with the licence of the Crown, he can sue on his executed contract during the existence of war (Wells *v.* Williams, 1698, 1 Salk., 45). Also, an alien domiciled in the British Isles may have the right, apart from any licence, to enforce the contract indirectly by recourse to such form as self-redress and lien.

On the other hand, if the performance of the contract is on the part of the British subject he can enforce it by action during the continuance of war, provided, of course, that a cause of action has really accrued.

The general principle that an alien enemy's right to the performance and right of action on a contract, concluded and executed by him before war, is only suspended by the war, applies particularly to contracts which only require for their performance the payment of money by the other party.

When the unperformed obligation is not an obligation to pay money matters become still more complicated. If the obligation is in its nature incapable of being suspended, the contract will be dissolved (Griswold *v.* Waddington, 1818, 16 John., 438). This, for instance, would be the case if the proper performance of the contract required some dealings with the enemy during

the war (Esposito *v.* Bowden, 1887, 7 E. & B., 763). According to the writer in the *Commercial Review* for September, 1914, money paid in respect of executed contracts, under which no consideration has been received by the party paying the money, will be recoverable after the cessation of hostilities on the ground of failure of consideration.

It follows from the trading with Enemy Proclamation No. 2, Art. 5, that a debt due to an alien enemy residing in his own country is not only irrecoverable but also it is illegal to pay it to him. But if such an enemy has an agent in the United Kingdom duly appointed before the war, payment to such an agent will not be criminal, but on condition that the money should not be transmitted by him to his principal during the war. (cf. Kershaw *v.* Kelsey, 1868, 100 Mass., 561 : also Trading with the Enemy Proclamation No. 3, Arts : 5 (1), 6 and 7). But Art. 5 of the Proclamation of 8th October, 1914, clearly forbids such payment where the business is of insurance or re-insurance.

Chapter VII

Executory Contracts made with alien enemies before the outbreak of war —Forms of Executory Contracts which are not wholly avoided by the outbreak of war :—(*a*) Affreightment (*b*) Agency; (*c*) Insurance; (*d*) Leases; (*e*) Mortgages; (*f*) Negotiable Instruments; (*g*) Shares and Debentures in Companies—The law applicable to each.

(*a*) *Affreightment.* The performance of such a contract is conditional on there being no prevention from any of the contingencies, such as 'the king's enemies,' 'the restraint of princes and rulers.' If fulfilment is impossible without engaging in intercourse with the enemy, the contract is *ipso facto* dissolved (Reid *v.* Hoskins, 26 L. J. Q. B., 5). A declaration of war may at once render the contract void (Avery *v.* Bowden 25 L. J. Q. B., 49). All goods in the enemy country are invested with enemy character; hence in the absence of a special licence, exportation becomes unlawful, and the agreement relating thereto null and

void (Esposito *v.* Bowden, 27 L. J. Q. B., 217). Accordingly, if a shipowner carries a cargo under such circumstances as amount to trading with the enemy, an action to recover freight so earned will not be entertained (Muller *v.* Gernon, 3 Taunt., 394). If enemy goods are seized on board a neutral vessel, the captor must ordinarily pay the full freight to the neutral carrier (The Copenhagen, 1 Rob., 289), but not so if the goods are contraband (The Mercurius, 1 Rob., 288). If an enemy vessel is seized with a neutral cargo on board, the captors may take the goods to their destination and receive the freight thereon. But should restoration of both ship and cargo be effected without unlivery, the original contract is not dissolved, and the parties are put into their original position.

A mere apprehension that the place of loading is about to become hostile is not sufficient to cause an abandonment of such contract; the restraint must be actual and operative, and not merely expectant and contingent (Atkinson *v.* Ritchie, 10 East., 530). On the other hand, "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay;" hence no action for damages would lie in case of deviation in the voyage, or detention of the vessel in neutral waters in order to avoid imminent risk of capture. (The San Roman, 3 A. & E., 583; the Patria, 3 A. & F., 436). Apart from the understood exceptions, should any circumstances arise which would render the lawful fulfilment of the contract impossible, *e.g.*, in case of a port being blockaded, it would be dissolved by *force majeure* (Baily *v.* De Crespigny, 4 Q. B., 180) on the principle that "*lex non cogit ad impossibilia.*" An embargo does not operate in this way; it merely effects a temporary suspension of the contract and the liabilities thereon for the time being; and on its removal the contract is restored (Hadlay *v.* Clarke, 8 T. R., 259). But should it continue so long, or is laid under such circumstances, as in fact to defeat the object of the voyage, the contract would be dissolved on the principle "*lex non cogit ad impossibilia.*"

But an Executory Contract is a sort of contractural engagement which is either wholly unperformed or in which there remains something to be done on both sides. There is very little authority in English Law as to the effect of war on such contracts concluded with alien enemies before the commencement of hostilities. The only place where the law on this point is stated is a note at the end of Clementson *v.* Blessig 1855, 11 Exch., 135 But this statement, it has been said, is to be taken with some degree of modification as it refers to special classes of such contracts.

The celebrated American decision of Griswold *v.* Wadington (1818, 16 John., 438), which is frequently quoted as an authority for the contention, does not lay down any such principle at all, while in a much later, but also widely-quoted case, decided by the American Supreme Court (*e.g.*, New York Life Insurance Company *v.* Statham, 1876, 19 Am. Rep. 512: Note) one of the judges referring to the exception to the general rule under which the outbreak of war has a more suspending effect on executory contracts, states that an exception arises in the case of '*Executory Contracts in which time is of the essence of the contract.*' This will mean then that executory contracts in which time is *not* the essence are not cancelled by the outbreak of war.

The rule that the right to enforce an agreement with an alien enemy entered upon before war is only suspended during the continuance of war and that it revives after the conclusion of peace has in many cases been laid down without any qualification. Thus, for instance, in the judgment of Alcinous *v.* Nygreu (1854, 1 Jur. N.S., 16) the following passage occurs in support of the contention: "The contract having been entered into before the commencement of hostilities, is valid; and when peace is restored, the plaintiff may enforce it in our Courts."

A contract which is wholly executory or if it is such that according to its terms it ought to be performed during the war and performance after the war would not satisfy the

contract, then it is abrogated and the parties are left in the position in which they found themselves at the date of the outbreak of war (Esposito *v.* Bowden, 1857, 7 E. and B., 768). An executory contract concluded with an alien enemy before the war is merely suspended during the war as regards the rights of performance and action (Janson *v.* Driefontein, Consolidated Mines Ld., 1902, A. C., 480). But such a contract is either avoided or dissolved by the outbreak of war (*a*) if it enures to the benefit of the enemy (Furtado *v.* Rodgers, 1802, 3 B. and P., 191) or (*b*) if in its nature it is incapable of suspension (Griswold *v.* Wadington, 1818, 16, John., 428). Similarly, it has been held in Zinc Corporation Ld. and Romanie *v.* Skipwith (1914, 31 T. L. R., 106, although reversed on other grounds without dealing with the point) that it is not contrary to public policy for a contract made before war to provide that after the war is over, trading shall be resumed with persons, who, in the meantime, have become alien enemies. In the more recent case of Zinc Corporation Ld. *v.* Hirsch (Aron) Und Sohn, 1915, 140 L. T. Jo. 154 C.A., the Court held that a contract, which provided that the agreement should be suspended in the event of war, was nevertheless dissolved, on the ground that the suspension referred only to deliveries under the contract, and therefore in other respects the provisions of the agreement were to remain unaffected, which, since the outbreak of war, would be illegal. It may, however, be noted in passing that the liability of an alien enemy lessee for rent is not limited to rent which became due before the outbreak of war, but extends to rents accruing after that date (Halsey *v.* Lowenfeld, 1915, 32 T. L. R., 138).

The foregoing is therefore a general statement of the law on this topic. It must be borne in mind that it relates to contracts between parties '*divided by the line of war*,' that is to say domiciled or for the time being in the countries of the respective belligerents (*cf.* Pitt Cobbett's Leading Cases on International Law, 3rd Ed., Vol. 3, p. 66).

The above views of the British and American case-law show that the suspensory effect of war on executory contracts is, as a rule, chiefly confined to those of a continuous nature. When the executory contract is not of this character but relates to a single transaction, *e.g.*, a sale of goods or land, it will generally be dissolved by the outbreak of war. In many such cases time will be of the essence of the contract, either by the express agreement of the parties or from the circumstances of the cases, as for example, in an agreement to sell perishable goods or an interest in property of a speculative or wasting nature. They are, of course, some contracts where time is not the essential question, *e.g.*, a promise to marry. But in most cases time either is or becomes important. So the duration of war beyond what would be regarded by the court as reasonable in a given executory contract of this nature will probably dissolve the agreement.

There are some contracts, which though executory, remain in force. "Thus," as pointed out by Messrs. Baty and Morgan, "a German Hamburg merchant has paid for a series of architectural plans, to be prepared and handed to a specified builder in Newcastle. There is no reason why the contract should be cancelled or even suspended, since it involves no communication with the enemy, no benefit to the enemy and no injustice to any one. The remedy is no doubt suspended until the close of hostility, but it is dubious whether the delay in performance could then be depended. The case is, of course, different where the British party has not enjoyed the benefit of the contract. He cannot be expected to perform his part in expectation of a return at some indefinite date. Such a contract should be cancelled by the outbreak of war" (War: Its Conduct and Legal Results, p. 278), but Sir William Scott has given such engagement a somewhat lenient view in Juthrow Catherine, 1804, 5 C. R., 140.

Besides (*a*) Affreighment, which has been treated above, the other particular forms of Executory Contracts, to which the law propounded above is more or less applicable are:

(*b*) Agency; (*c*) Insurance; (*d*) Leases; (*e*) Mortgages; (*f*) Negotiable Instruments; (*g*) Shares and Debentures.

Agency:—According to the American decisions on this point the relation of principal and agent existing between the residents of belligerent states, is not necessarily terminated by the outbreak of war. Whether the agency will be revoked or not depends upon the circumstances of the case and the nature and character of the agency (Williams *v.* Payne, 1898, 169 U. S. Reports, Sup: Court, 65). It is interesting to note, however, that an agency for general purposes conferring a general authority is probably terminated (U. S. *v.* Grossmayer, 9 Wall., 72). An agency, limited to a particular business, is suspended so far as it involves any intercourse or dealing with the enemy or any transmission of money or property to an enemy country (Small's Administrator *v.* Lumpkin's Executor, 28 Graft., 832). But where such agency does not involve prohibited acts or the assent of the principal, or his subsequent ratification is expressly given, or may reasonably be implied, it continues until otherwise ended (New York Life Insurance Co *v.* Davis, 1877, 95 U. S. Reports Sup. Court, 425). It has also been followed in the same decision that if the agent has the property of the principal in his possession or control, he must preserve its safety during the war and must restore it faithfully at its close.

It was decided in Moosseaux *v.* Urquhart, 1867, 19 La. Ann., 482, that an agent for the management of property in a belligerent country remained bound by the contract of agency to his enemy principal and a payment of a debt by the debtor to the agent was held justified, both residing in the same country (Robinson *v.* International Life Assurance Society, 1870. 1 Am. Rep., 490). But it was a condition precedent that the agent should have been appointed before the war (U. S. *v.* Grossmayer, 9 Wall, 72).

That was the establishtd law on the point up till 1914 when the decision of *Orenstein and Koppel* v. *Egyptian Phospate Co. Ld.* (1915, S. C. 55) brought about the changed view. Lord Strathclyde, who gave the judgment, declared that in

that case an express provision was given and that nothing short of an express licence to pay the enemy's agent would affect the sweeping prohibition contained in Sec. 5, sub-Sec. (1) of the Proclamation No. 2 of the Trading with the Enemy and held that a mere agency was not a branch within the said Proclamation, para. 6, and that payment of money after the date of the Proclamation in fulfilment of a contract current on the outbreak of war was not a transaction.

The American decisions on this point are unhappily at variance with the Acts, Orders in Council and Proclamations relating to the present war. Messrs. Baty and Margan while considering the point says: "If partnerships are cancelled between subject and enemy, so must agencies be. And if the agency is at an end, the agent's authority is determined. But, conceding for the moment that it continues, can the agent enforce his hostile principal's rights? And are voluntary payments to him on account of his principal valid?" (War: Its Conducts and Legal Results, p. 278). The same two well-known authorities in dealing with the topic of performance by agents have observed as follows: "We are unable, however, to see that there can be any harm in the mere receipt of goods or cash from an enemy through whatever channel in England. This seems to be prohibited by the Proclamation of September 1914; but more dangerous things have been allowed. (*Ibid*, p. 46.) They support their remark by quoting from Allen *v.* Russel (3 Am. Law Register) as follows: "If an enemy orders his agent in the North to pay a debt contracted before the war, I am not aware of anything wrong in this according to the public law of war. Goods might be seized in passing, but the appropriation of property or money already here is not prohibited."

It has also been held in America that an arrangement by an agent for protecting and safe-keeping his principal's property if that principal subsequently turns out to be an alien enemy, would be valid (U. S. *v.* Quingley, 103 U. S. Rep. Sup. Ct., 595). A sale by the agent of his principal's property during the progress

of the war was considered valid in Murrell *v.* Jones (46 Miss., 565). In Williams *v.* Payne, (1898, 169 U. S. Rep. Sup. Ct., 55) a power of attorney executed by a married woman, with her husband's concurrence, to convey her lands was held valid and not revoked by the outbreak of the civil war. And in Pope *v.* Chafee (14 Rich. S. C., 69) an authority to an agent to receive the proceeds of the sale of his principal's land was not deemed revoked by such principal being taken a prisoner of war. Though it was held in Blackwell *v.* Willard (1871, 6 Am. Rep., 749) that the relation of attorney and client was generally terminated by war, the decision in Washington University *v.* Finch (13 Wall., 259) upheld the attorney's defence of an action against his client. An agent is bound by law to render account to his principal on the termination of war (Aldwell *v.* Harding, I Low., 326). An agent managing under a power of attorney business carried on by an alien enemy was held not entitled to bring action for a declaration that he was a trustee of the assets of the business and entitled to collect and give receipts for money's due to the business, or for the appointment of a receiver, on the ground that he had no greater right than his principal, who being an alien enemy, could not sue (Maxwell *v.* Grunhut, 1914, 31 T. L. R. 79, C. A.)

Insurance :—The rules governing insurances of enemy's goods against losses happening during time of war were settled in Great Britain about a century ago in a series of decisions which arose at the time of the French Revolutionary and Napoleonic Wars.

On the Continent of Europe, the insurance of enemy's goods at sea against capture by the insurer's own State was generally speaking, illegal from early times on the ground that the destruction of the enemy's commerce was one of the aims of the insurer's Government, and that to insure an enemy's ship or cargo against such capture constitute really an encouragement of the enemy's commerce. This was the law in Spain and France and more or less in Germany, the Netherlands and Italy, and by the time of the French Revolutionary Wars it had become

the general rule on the Continent of Europe that the insurances of enemy's property at sea was illegal and void.

In order to understand the course of judicial decisions in England it is necessary to bear in mind that two distinct questions may arise according as the insurance was effected before or after the outbreak of war. Insurances were, in fact, not unoften made by British subjects, upon the property of those who were, at the time, subjects of an enemy state and which property was engaged in a trade, which it was the object of the British Government to repress. Referring to such insurances Kent remarks that both Valin[1] and Emerigon[2] have observed with a degree of surprise that English insurances of Frenchmen's property were done during the war of 1756. This is what Kent says on the point: "These English insurances were recognised as lawful and it cannot but excite our astonishment that they were ever hazarded."

It must be noted, in passing, that, among the kinds of contracts that are cancelled by the outbreak of war, special importance attaches to marine insurance contracts covering enemy's property against risks of capture by British ships.

It was not until the year 1800 that it was first held in England that it was illegal to insure property engaged in trade between Great Britain and the enemy country. In that year it was decided in Potts *v.* Bell (1800, 8. T. R., 548) that all trade with the enemy was illegal. According to the earlier decision of the *Hoop* (1799, 1 Ch. Rob., 196) it was illegal to encourage such trade by insuring the property engaged in it. It must be borne in mind that in that case the illegalty of the insurance resulted from being an encouragement to trade with the enemy, which it was the direct object of the Government to stop. It would follow from the same principle, therefore, that any contract of insurance with the enemy, made during war, would be illegal and voided.

[1] A well-known French Jurist of the 18th century.

[2] A French authority on Insurance Law.

Two years later, in 1802, the question as the operation of an insurance made before the outbreak of war, in the event of a capture by a British ship, or the ship of an ally, during war, was dealt with in the case of Furtado *v.* Rodgers (3 B. & P., 191). The facts of the case were briefly these: Furtado, a Frenchman, insured his ship, the *Petronelli*, from Bayonne to Martinique and back to Bayonne. The policy was dated October 1792. In November, 1793, war having broken out between France and Great Britain, Martinique was captured by the British, and Furtado's ship, the *Petronelli* was captured along with other French vessels. When the policy was effected and until action was brought, the plaintiff, Furtado, was resident at Bayonne and France was at peace with England when the policy was effected. Hostilities between the two countries broke out in 1793. An action on the policy was brought after the cessation of hostilities. The question raised in the action was, whether after the cessation of hostilities, a Frenchman was entitled to recover in the English Courts upon a policy of insurance effected in England before commencement of hostilities for a loss by British capture during the war. The principles applied in that case are laid down by Lord Alvanley, C. J., as follows in the course of his judgment: 'There is no express declaration, of the Court of King's Bench either for or against legality of such insurances, and the question comes now to be decided for the first time. We are of opinion that to insure enemy's property were at Common Law, illegal for the reasons given by the two foreign jurists (Bynkershoek and Valin) to whom I have referred.' The effect of the case was that any contract of insurance whenever made, so far as it insured the property of an enemy against a loss, which it was the object of the British Government to inflict upon him, was void.

In 1802, too, principles similar to those laid down in Furtado *v.* Rodgers were affirmed in the case of Kellner *v.* Le Mesurier (1803, 4 East., 401) the judgment of which was given by Lord Ellenborough. His Lordship decided that an insurance must

contain an implied exception of losses caused by British captures. On similar grounds were based the next decision of Gamba *v.* Le Mesurier (1803, 4 East., 401) where it was held by the same Judge that the insurance was dissolved, not suspended, by the outbreak of war. The third similar case decided in that year by the same authority was that of Brandon *v.* Curling (1803, 4 East., 410) where, in confirming his decisions in the above-mentioned cases, he held that the insurance against the capture of an enemy's goods at sea, though effected with a British under-writer before the outbreak of war, could not be enforced against such under-writer even after the restoration of peace, in order to recover a loss by capture of an ally of Great Britain.

It may be noticed in passing that it has been held by both Bynkershoek and Valin that a marine insurance was peculiarly improper as tending to support enemy's mercantile marine.

To sum up briefly. The following principles bearing on the subject seem to have been established a century ago and have remained unaltered ever since.

(1) That any insurance of property, which would tend to act as an encourgement of commerce, which it is the object of the British Government to damage or destroy, is just to that extent illegal and void.

(2) That any contract of insurance made during a war between the countries of the insurer and the insured is wholly illegal and void as constituting a species of trading with the enemy.

Next, we have to consider the case of an insurance effected before the outbreak of war on property on land belonging to one, who subsequently becomes an enemy against a loss, which occurs during war between the countries of the insured. If the question is to be decided upon principle it is not easy to say exactly on what ground the insurance would be held valid. In order that it should be valid it must be shown not to be contrary to any principle of policy of the British Government. But it is no part of the policy any civilised government in time of war to destroy the private property of alien enemies situated on land, whether in the territory of the belligerent or in that of neutral

power. The only occasion, on which it is now generally considered lawful to seize or destroy the private property of enemies situated in the enemy territory, is military necessity (*cf.* Wheaton's International Law, 5th Ed. p. 504.)

After the lapse of a century from the time of the Napoleonic Wars, the question as to the legality of the insurance of enemies' property again acquired importance owing to the insurance by British subjects of property in the Transvaal effected before the outbreak of the war. In the absence of any express decision to the contrary, although there are observations of some of the judges pointing the other way, the true principle seems to be,—that a loss covered by an insurance effected before the outbreak of war is recoverable after the war is over, although it be in respect of property belonging to an enemy, unless it were the positive object of the British Government to capture or destroy that kind property, or unless some other object of the British Government would be defeated by the insurance being allowed to be valid (Janson *v.* Driefontein Consolidated Mines Ld., 1902, A. C., 484).

It would seem to follow from the above proposition—that it was not the aim of the British Government to destroy the property of enemies situated on land; that to indemnify an enemy against the accidental destruction of such property would not conflict with any object at which the Government was aiming; and that such an insurance would be only invalid if it would indemnify the enemy against a loss which the British Government intended him to undergo.

In time of war the private property of enemies is liable to be confiscated by way of penalty for military offences. As in this case the loss is one which the British Government inflicts deliberately it would follow that any insurance by an English subject against such loss would be void. Another instance of the seizure of enemies property on land is when forced contributions are raised for the support of the army and not the deprivation of individuals of their property; it would be conceived that an insurance against loss in this way would be unobjectionable.

Two questions now arise on a consideration of the foregoing statements, namely:

The legality of an insurance by a British subject of the property of an alien enemy against the risk of capture by the enemy's Government.

The legality of an insurance by a British subject of the property of another British subject situated in the territory of the alien enemy, against the risk of capture by the enemy's Government.

The first of these questions was discussed in Driefontein Consolidated Mines Ld. *v.* Janson (1900, 2, Q. B. 339). There the plaintiff company was registered under the laws of the South African Republic just a few days before the outbreak of war between Great Britain and the Transvaal. The Company had an office in London but its head-quarters were at Johannesburg. The majority of its share-holders were Europeans, British and Neutrals, and not subjects of the Republic. The treasure of the Company was insured with British under-writers against capture during its transit from the Transvaal to England. Hostilities then broke out between the two countries. The Government of the Transval seized the treasure during the course of its transit just before the war began between the British Government and the Government of the Republic. The insurances were held valid and not opposed to public policy. An action was held to be maintainable in England against the under-writers after the restoration of peace, although the seizure, it was maintained, was made in contemplation of war, and was made for the purpose of securing funds to prosecute war against Great Britain. The *ratio decidendi* of the case was that when the insurance was effected there was no existence of war between the countries of the two contracting parties. There was only *imminence of war* which, it has been held, is not *war*.

The second of these questions was discussed in the equally important case of Nigel Gold Mining Co. Ld. *v.* Hoade, (1901, 2 K. B., 849). In this case the plaintiff company was registered as a joint-stock company in the British Colony of Natal, and

was treated as a British subject. Prior to the war the Company had worked the mine they owned in the Transvaal and up to the time of the outbreak of the war. Since the outbreak of war between Great Britain and the Transvaal they had sent the gold extracted in one shape or other to England. Before the declaration of war the plaintiff Company had effected with the defendant, a British subject, a policy of insurance of their products with the defendant British subject. On the breaking out of hostilities the company ceased to work or to transact any business in the Transvaal and there was nothing to show that they ever intended to continue their operations afterwards. It was held that the products were British goods and that the company was a British company and could enforce the contract of insurance of goods situated against the British subject for loss sustained during the war.

To recapitulate the results of the discussion. As far as the private property of enemies on the sea is concerned this is still, as it was a century ago, liable to capture as a means of destroying the maritime trade of the enemy. The reasons, therefore, which originally caused insurances of such property to be held invalid, still exist and there is no reason to suppose that there is likely to be any change in this respect so long as property of this description is liable to capture.

Again, the rule prohibiting all trading with the enemy, except by special permission, remains in full force and this rule operates to prevent a valid insurance being effected of an enemy's property while the war is in progress.

There are no English cases on the effect of war on life-insurances, where one of the parties to the contract becomes an alien enemy. There are some American decisions on the point, but they are sadly conflicting.

As a general rule contracts of life-insurance, whose premia are payable at stated times, one or more of which fall within the period of the war, unless there are special terms in the policy meeting the case, are generally abrogated by the war. The payment of such premia to an alien enemy would be

illegal, but it is not inconsistent with the terms of a policy that the insurance should subsist if the premia could not be paid. A failure to pay the premia during the war avoids the policy (Worthington *v.* Charter Oak Life Insurance Co., 1874, 19 Am. Decisions, 495). When such failure arises from the fact that it would involve intercourse with an enemy in his territory then, although the contract is terminated, the assured is entitled to the equitable (surrender) value of the policy arising from the premia actually paid at the end of the war (New York Life Insurance Co. *v.* Statham, 1876, 93 U. S. Rep. Sup. Ct. 24). The payments of premium during the war by the assured to the agent of the company, who resides in the same country as the assured, will keep alive the insurance (Robinson *v.* International Life Assurance Society, 1870, 1 Am. Dec., 490), provided the agent continued to have the authority to receive the premium but not with the view to remit it to the enemy country (New York Life Insurance Co. *v.* Davis, 1877, 95 U. S. Rep. Sup. Ct., 425). Where a British subject resident in the country is the assured, an action may be brought on the policy even after the commencement of hostilities (LeBret *v.* Papillon, 4 East., 502; Robinson & Co. *v.* Continental Insurance Co. of Mannheim, 1915, 1 K. B., 155; Karberg & Co. *v.* Blythe & Co., 1916, 1 K. B., 541).

It could thus be concluded from the cases cited above that if a British subject was insured with a German Life Office which had a branch in the United Kingdom payment of premia by him during the war to such branch would bind the German Life Office. Such a transaction, it has to be borne in mind, was expressly allowed by Art: 6 of Trading with the Enemy Proclamation No. 2, of 9th September 1914. But it is doubtful if it has kept any force in the face of the provisions of the Proclamation of 8th October, 1914. At a Conference of the International Maritime Committee at Copenhagen in May 1913, Sir Edward Beauchamp, Chairman of Lloyd's, stated the official position of British under-writers as follows: 'No contracts of marine insurance will be repudiated

on the ground that it covers enemy goods, but all such contracts will be faithfully carried out.' This statement, it has been maintained, expresses only the commercial view and does not afford a solution of the crucial point.

During the present hostilities the position has been made clear by the Royal Proclamations of the 4th August 1914, and of the 9th September, 1914, and the Trading with the Enemy Act, 1914, by which payments in fulfilment of contracts of insurance have been totally forbidden, making such payments at Common Law high treason. The abolition of the present belligerent right of capturing private property affords another indirect solution for the vexed problem.

Leases:—The American view seems to be that a lease is not dissolved by war, but that the remedy of the party to it who becomes an alien enemy is suspended during the war. The case in point is that of Kershaw *v.* Kelsy, 1868, 100 Mass., 561. In this case a citizen of Massachusetts, residing at Mississippi during the Civil War, leased a plantation but was turned out from there by the soldiers of the Confederate States and had returned home to his State. The lessor then took charge of the plantation and delivered a certain amount of cotton to the lessee's son in Mississippi, who shipped it to the lessee at Boston. On the conclusion of peace the lessor sued the lessee for rent. In pronouncing the judgment, Gray, J. said: "the lease now in question was made within the rebel territory, where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term. No agreement appears to have been made as part of a contract contemporaneously with the lease, that the cotton crop should be transferred, or the rent sent back, across the line between the belligerents, and no contract or communication appears to have been made across that line relating to the lease, the delivery of possession of the premises or of the corn or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful;

but that cannot affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not continue the law of nations, or the public acts of Government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent and the value of the corn.

The case has been frequently cited and regularly followed in America.

As to the effect of contract between lessor and lessee in case of an enemy's invasion into the territory it has been held by an authority that: 'If the lessee have just cause for vacating the property let he is not liable to payment, except in so far as he has had the use of the thing let to him.' An incursion of an enemy which the lessee cannot resist is a *just cause* and therefore the contract will be annulled.

Some of the principles above enunciated have been accepted by the Cape Supreme Court in Rubidge *v.* Hadley, 2 Menz., 175. In the recent case of Halsey *v.* Lowenfeld (1916, 1 K. B., 143) a suit for rent under a lease was held maintainable, the rent accruing due after the declaration of war. It was held in that case that there was created a term of years by the lease and that it vested in the defendant and that the interest was not affected by the provisions of Orders in Council and that the fact that he could sub-let showed that the performance of the contract had not become impossible.

Mortgages.—War does not suspend a mortgage where there is no occasion to resort to enemy's courts to enforce it against the mortgaged property. In Dorsey *v.* Kyle (1869, 96 Am. Dec., 663) it has been held that war does not have the effect of preventing a citizen of a State from enforcing its laws in the courts of that State so as to subject a non-resident enemy's real state situated therein to the payment of a debt contracted before war, and secured

by a proper mortgage on the property itself, which has been executed and properly recorded prior to hostilities. The title of a purchaser from the mortagee has also been held to be valid.

Negotiable Instruments:—When a Negotiable Instrument, such as a bill of exchange, is made before the outbreak of war between persons 'divided by the line of war,' it is unenforceable by an alien enemy during war, but the remedy revives on the conclusion of peace (Antoine *v.* Morshead, 1815, 6 Taunt., 332; Pitt Cobbett's Leading Cases on International Law, 3rd, Ed., Vol. 2, p. 87). Art. 5, sub-sec. 4 of the Trading with the Enemy Proclamation No. 2 of 9th September, 1914, warns any holder of a negotiable instrument in the British dominions 'not to accept, pay or otherwise deal with a negotiable instrument which is held by or on behalf of an enemy.' But it provides that 'this prohibition shall not be deemed to be infringed by any person who has no reasonable ground for believing that the instrument is held or on behalf of an enemy.' When a bill is made in war in favour of an enemy, its operation is suspended during war and a limited endorsement to a friend or neutral for the benefit of the enemy holder, even if made before the war, will not enable the endorsee to sue. (Haarbleicher and Schuman *v.* Baerselman, No. 1. The *Times*, 18th September, 1914: the endorsement in this case was 'for me to the order of (the plaintiffs) value in account'). Sankey, J. held the words 'for me' to be equivalent to 'for my use.' The plaintiff (endorsee) and the defendant (acceptor) were English firms. The payee who had endorsed the bill was a German. But it has been held that if the transfer was by a general endorsement to a neutral, the latter would be entitled to sue and recover upon the bill. (Haarbleicher Schuman *v.* Baerselman, No. 2. The *Times*, 14th October, 1914, where a bill was drawn by merchants in Petrograd on a British firm who accepted it, and was payable to the order of a Hamburg Merchant, who endorsed it.) Sankey, J. held in this case that the British firm could not refuse payment to the holders, a firm of bill discounters, in London, on

the ground that it was endorsed by an alien enemy inasmuch as the endorsement was not restricted.

After the war the bill may be sued upon without restriction, but in the case of an enemy plaintiff, without interest up to the end of war. If made during war in favour of an enemy they would, like other commercial contracts, be entirely void, both during and after war, unless they fall within the exceptions, *e.g.*, given in respect of trade carried on under the licence of the sovereign or as ransom bills. A transfer to a neutral or British subject would not in any way improve the position of the holder (Willison *v.* Patteson, 1817, 7 Taunt., 439). In this case an Englishman in a hostile country became endorsee of a bill by an enemy on an Englishman in England and sued after the war. Burrough, J. laid down the general proposition in the following words in the judgment thereof 'Michelon (an enemy) could not during war bring an action for money had and received against the holder of its funds here; neither can he, by drawing a bill on his debtor or endorsing it to another, produce the same effect.'

Bills of Exchange, granted or negotiated with alien enemies by British prisoners of war for their necessaries can be sued on by such alien enemies on the conclusion of peace (Antoine *v.* Morshead, 1815, 6 Taunt., 237).

Shares and Debentures in Companies :—Debentures held by a enemy will not be liable to confiscation, but as in the case of other debts, neither principal nor interest, will be paid during war, but will become payable according to the terms of the debenture after the termination of war. Debentures or coupons to bearer, even if originally held by an alien enemy, will be enforceable if they came by genuine transfer into the hands of a neutral or friendly holder. It may be difficult to show the real title, but it would be illegal to pay the amounts for the purpose of being transmitted to a hostile country. The rule of non-intercourse will prohibit the allotment of shares or debentures to an enemy during war, or any other act which confers property upon or results in payment to an enemy.

So far as the position of share-holders or debenture-holders of a company is concerned, it is submitted that if such persons are alien enemies, they do not cease to be share-holders or debenture-holders, but that their rights are suspended and revived after war (*cf.* Lindley on Companies, 5th Ed., p. 37). But the dividends on the shares and the interest on the debentures, so far as they are not represented by coupons payable to bearer, and of which therefore the onwership would not be apparent to the companies, cannot be paid to enemy subjects during war. At its close they will be entitled to claim back the dividends and interest, but no interest on debentures after their maturity, subject, in the case of share-holders, to any calls made in the meantime.

Chapter VIII

Effect of war on Partnerships where one partner is an alien enemy and on Shares in Companies held by alien enemies—Differences between Companies and Partnerships—Position of Directors of Companies—Enemy Debenture-holders.

The rights of share-holders in a limited company are theoretically contractual rights. Hence on the outbreak of hostilities such contracts as exist between an English company and an enemy shareholder, or between an English shareholder and an enemy company, ought to be dissolved forthwith in consequence of their executory nature. On the one hand they involve a continuing liability for calls on the shares; on the other there is an obligation to pay a periodical interest. Then there is the mutual and continuing right on the part of shareholders to assist in the management of the company's business. It is for this reason that text-book writers have held almost unanimously that a commercial partnership between partners, of whom one or more are alien enemies, is automatically dissolved by the outbreak of war. The authority which is frequently cited in support of this rule is the American case of Griswold *v.* Waddington in 16 John., 438. In order to appreciate the effect

of the judgment in that case it is necessary to take a careful survey of the facts thereof. Henry Waddington and Joshua Waddington had carried on the partnership business, the former living in London and the latter in New York. The partnership was dissolved by mutual agreement before the outbreak of hostilities between England and the United States. But the publication of the notice of dissolution as required by American law was omitted. The plaintiff Griswold, an American citizen, transacted business with Henry Waddington, the London partner, after the outbreak of the war. At the termination of the war Griswold sued Joshua Waddington, the American partner, for the balance due to him resulting from his transactions with the London partner. The plaintiff was non-suited both by the Court of First Instance as well as by the Appellate Court, chiefly on the ground that the business transactions between the plaintiff, an American citizen, and Henry Waddington, a British subject, were affected by the prohibition of intercourse caused by the war, and that consequently no valid claim could arise therefrom. Spenser, J., who decided the case on the strength of a rule of Roman law referred to in the Justinian Institutes, III, 25, 6, said: 'The state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of the relation.' The fact that the partnership was dissolved by the outbreak of war was referred to in the argument before the Court of Appeal, but that Court did not put much stress on that fact.

Sound reasons have been laid down in the decision of the above case. It is evident that a partnership between a British subject and alien enemy in the enemy territory cannot continue for the following practical reasons :—(*a*) the parties' power of mutual control cannot exist in the very circumstances of the case; (*b*) no person can derive any profit from his partner who becomes an alien enemy trading in the enemy country; and (*c*) it is impracticable to suspend all operations of the partnership-business during war until peace is restored, as it might be prejudicial to the other partners to have to carry on the profitless

partnership for the barren period of war and then to '*pick up the threads*" of the business which was practically given up.

The first two reasons have been stated by Chancellor Kent in the decision of Griswold *v.* Waddington. The third reason has been adduced by Hall in his Treatise on International Law. Also the Partnership Act of 1890, sec. 34, supports the foregoing proposition.

The character of a company will not be determined by ascertaining whether any or the majority of or all shareholders therein are enemies or not, but by ascertaining whether or not it was incorporated in the enemy territory, that is to say, by its commercial domicil (Janson *v.* Driefontein Consolidated Mines Ld., 1902, A.C., 484 ; Continental Tyre and Rubber Co. Ld. *v.* Daimler Co. Ld., 1915, I. K. B., 893). In Janson's case the House of Lords did not come to the conclusion that the respondent company was a subject of the Transvaal Government, merely because the company was incorporated in its territory, although the company was also resident and carrying on business in the Transvaal. In the Continental Tyre case, however, it was held that the sole fact to be ascertained was the place where the company was incorporated. For some purposes a company has been deemed to be resident where the central control and management actually abides (De Beers Consolidated Mines Ld. *v.* Howe, 1906, A. C., 455), but this is immaterial in considering whether a company is possessed of enemy character or not.

Although a Royal Proclamation can neither make nor declare the law (per Buckley, J. in Continental Tyre Co. *v.* Daimler Co., 1915, I. K. B. at p. 921) the provisions of the Proclamation relating to Trading with the enemy must be observed under pain of punishment (secs. 4 and 5 Geo. V., c. 17 s. 1 (2)), and also under sec. 1 (3) of the Act ' Every director, manager, secretary or other officer of a Company committing a breach of such provisions, who knowingly is a party to the illegal transaction, is deemed to be guilty of a criminal offence.

Also by para. 3 of the Proclamation of 9th September in the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country.'

The position of incorporated companies has not been the subject of many authoritative decisions in the English Courts. It has been said that the analogy with partnership was not a safe guide. The personal relationship of partners, as has been seen, makes it impossible for a partnership to be carried on with all its incidents during war between the countries to which the partners respectively belong (*Exparte* Boussmaker, 1806, 13 Ves., 71 ; Griswold *v.* Waddington, 1819, 16 John., 439), but the position of a shareholder in an incorporated company is not the same as that of a partner. He has no direct share in the management of the business ; he is not (unless he be a director) the agent of his fellow shareholder ; and he has no direct ownership of the corporate property, while the company is a single person in law, taking its character as a friend or foe from its domicile. It would, therefore, seem that there is no reason for the dissolution of the relationship between an enemy shareholder and a corporation. The position is that his right to participate in dividends or a distribution of assets, or to take part in the management of the affairs of the corporation by voting at general meetings, either by proxy or otherwise, is suspended during war (Robinson *v.* Premier Oil and Pipe Line Co., Ld., 1915, 2 Ch. 124 and cases therein cited ; also Rex *v.* London Country Council, 1915, P. 2 K. B., 466), but revives on the revival of peace, it being the duty of the corporation to retain any dividend or share of assets till the end of war, to be accounted for to the enemy shareholder (*Exparte* Boussmaker, 1806, 13 Ves., 71). Lord Erskine who decided the case allowed the enemy creditors' claim to be entered in bankruptcy in order that the whole fund might not be divided, but a proper proportion reserved to meet the creditors' claim at the conclusion of the war. On the other hand it would seem that a relationship of an enemy director to the company is inconsistent with the duty of a non-intercourse

and that it must follow that he vacates his office on the commencement of hostilities.

Some authorities assert that any person who is at the outbreak of war a member of an English company forfeits his membership thereof as soon as war breaks out, but that after the termination of the war such a person becomes entitled to claim payment for the value of his share at the time of the outbreak of war (*e.g.*, Dr. Baty's International Law in South Africa (1900), p. 94). There is no authority whatever for this allegation, and the difficulties, which would arise if such a rule were applied, are so great that it may be taken for granted that no court will ever accept it. The only practical method for dealing with the problem is the one suggested by Professor Westlake in his book on International Law at pages 53 to 55.

At the beginning of the present war some authorities thought that when an English company had enemy shareholders residing abroad, the form of sending them notices of intended meeting should be complied with; but sending such a notice will be tantamount to having intercourse with an alien enemy, and the decision in Robinson *v.* Premier Oil Co. is clear enough to suggest that the Trading with the Enemy Act and the Proclamations made thereunder are not exhaustive in the sense that anything not expressly prohibited by them must be taken as permitted and that by Common Law, which is still applicable to all such cases, not only commercial intercourse, but all intercourse whatever with an alien, is clearly forbidden.

It has recently been held that where a German company and an English company were registered as joint-owners of certain Letters-Patent under a deed which provided that the English company should have the sole right of bringing actions to protect the patent from infringement, an action brought in the joint names of both the companies was allowed to be heard during the war as it was held that the person to protect the patent was virtually the English company (Mercedes Daimler Motor Co., Ld., and another *v.* Maudslay Motor Co., Ld., 1915, 31 T.L.R., 178). This decision has, however, to be distinguished

from the decision in Actien Gesellschaft Fur Anilin Fabrikation in Berlin and Mersey Chemical Works Ld. *v.* Levinstein Ld., 1915, 84 L J. (Ch) 842, C. A., where an action brought before the war for infringement of a patent, the co-plaintiffs being an English company and a German company, the latter having assigned the patent to the former, and suing as trustee for the alien company, also the claim of the alien enemy company for damages when the patent was vested in it and the claim of the alien company for damages during the subsequent period being combined in the same action, it was held that an appeal by the two companies in respect of the action must remain suspended during the continuance of the war, as the alien enemy company could not be struck out from the proceeding.

It has been suggested that the dividends accruing to alien enemies during war may lawfully be confiscated by the State like other enemy properties in British territories. But it has not yet been quite settled whether, if such dividends were not confiscated, alien enemies would be entitled to recover them after the close of war (Brown *v.* U. S. 1810, 8 Cr., 110; Wolff *v.* Oxholm, 1817, 6 Mass., 92; Hanger *v.* Abbott, 1867, 6 Wall., 332).

The masterly academic discussions on this topic carried on in the Law Quarterly Review (Vol. 31, 1915, April No., pp. 170-172 and July No., pp. 247-249; Notes) by Mr. James Edward Hogg and others may be referred to as making the treatment of the subject completer. It has been conceded, however, that whatever may be the opinions of the majority of the judges who decided the Continental Tyre case, the cogent reasoning and good sense of the dissenting judgment of Buckley, L. J. (now Lord Wrenbury) will ultimately prevail. In fact Lord Lindley in a letter to the *Times* of May 1, 1915, dwelling on the point says as follows: 'I trust that the dissenting judgment of Lord Justice Buckley will ultimately prevail, either by a reversal of the decision or by an amending Act of Parliment.' Also in another letter in the *Times*, Lord Wrenbury in his turn says that if so great an authority (Lord Lindley) thinks the decision of the Continental

Tyre case is not the law, the question ought not to be allowed to rest short of the ultimate Court of Appeal. 'If on the other hand,' he adds,' the law is not as Lord Lindley thinks it is, then legislation is, I conceive, imperatively needed.' But it must be remembered that so long the legislature has recognised the correctness of the ruling in the Continental Tyre case.[1]

The Trading with the Enemy Act, 1914, contains no explicit statement as to the effect of war on partnerships. Sub-section 2(*a*) of section 2 apparently assumes that a partnership is not dissolved when one of the partners becomes an alien enemy. On the other hand section 3 recognises the difficulties of carrying on business under such conditions and makes definite provision for them of such a nature as to suggest the dissolution of a partnership by war. The recent English decision of Armitage *v.* Borgman (1915 W. N., 21) has also left the point undecided. The Colonial cases of *in re* Jenkins, 1904 4 State Rep., 625, decided by the Supreme Court of New South Wales, Australia, and of Morgan *v.* Deputy Federal Commissioner, 1912, 15 Commonwealth, L. R. 651 decided by the High Court of Australia will furnish details for a fuller and better understanding of the underlying principles.

It must not be forgotten that there are important differences between companies and partnerships. A company is a legal person and continues its existence even on the withdrawal of a shareholder, but a partnership is extinguished if a partner retires. The liability of a shareholder is limited while a partner's is unlimited. The control exercised by a shareholder in the case of most companies is slight; a partner's is so great that he can bind the firm. A shareholder can dispose of his shares easily but not so a partner. A company usually consists of a large number of shareholders; the number of partners in a firm is generally small. It is clear therefore that the reasons advanced for the dissolution of partnerships are not equally applicable to the

[1] This was written in 1916. The decision has ultimately been revered on appeal as expected; *cf.* The Law Quarterly Review, January 1917, Art: Personal Character of a Corporation by Mr. Edward Hogg. Author: March, 1919.

case of most companies. Mutual control not being indispensable, the principle of non-intercourse has little or no effect, and it is scarcely detrimental to national policy to allow an enemy shareholder to retain his rights and liabilities during war, especially as the control he can exercise is so small. Suspension of those rights and liabilities is just and practicable inasmuch as the affairs of the company remain in the control and management of its directors and servants. But abrogation thereof is both unnecessary and unreasonable. Shares in a company are really rights of property, though they may be technically regarded as contractual rights, and as such, they cannot now be lawfully confiscated on the outbreak of war. It is conceived then that the only necessary measure, in accordance with the doctrine of non-intercourse, is to suspend merely the payment of interest until the return of peace. This suspension need not amount to a total discontinuance, for it is not conceivably antagonistic to the interests of law or national policy to permit the interest accrue till the land of hostilities in the face of the completion of war. In the case of a private company the directors usually exercise the entire control. Hence when an outside shareholder becomes stamped with enemy character, his rights and liabilities remain unaffected. But if a private company has a branch in another country and afterwards war breaks out between the two countries, the director controlling the branch establishment will necessarily be stamped with enemy character, for the nature of his control really constitutes him a partner with limited liability. In the case of ordinary companies a person who is a director is also a shareholder. In war his contract as a director will be abrogated. The principle of agency can scarcely be urged here, as it was more in the nature of fiction than of reality. In a private company the director, if he becomes an enemy, ceases to be a director as well as a shareholder.

With respect to the enemy debenture-holder, it has been held, he will not lose his principal as a consequence of the Statute of Limitations running during war. This position has been

well established in the United States. In Hanger *v.* Abbott (6 Wall., 632) the Supreme Court held that 'peace restores the right of the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period.' This ruling has been followed in several subsequent cases in America. But it appears that it has not been wholly accepted by the British Courts.

Chapter IX

Effect of War on Contracts made during war with alien friends—On Contracts of which a part only is illegal—On Contracts creating impossibility of performance.

Some of the prohibitions resulting from the outbreak of war do not only affect transactions with alien enemies, but also made it impossible to enter into certain kinds of business with persons who are not alien enemies, as also to carry out transactions entered upon with any such persons before the outbreak of hostilities.

Trading with persons who are not alien enemies is also affected by one of the prohibitions contained in clause (7) of Proclamation, No. 2, by virtue of which it is, among other things, unlawful:

(*a*) To supply to or obtain from any person any goods, etc., for or by way of transmission to or from any enemy country.

(*b*) Directly or indirectly to trade in any goods, etc., destined for or coming from an enemy country.

(*c*) To carry any goods, etc., destined for or coming from any enemy country.

A contract made before the outbreak of war with a party who does not subsequently become an alien enemy is not affected by war. Such a contract gets dissolved by war in two cases; namely (1) where a state of war makes the contract

illegal: or (2) where the performance of the contract is thereby rendered impossible, provided that the possibility of performance was known by the parties to depend upon the continuance of a state of peace. The leading case of Esposito *v.* Bowden, 1857, 7 E. & B., 763 establishes the rule of the first case when it held that a contract made before war was dissolved where the outbreak of war had made its performance illegal. Some of the authorities bearing on the subject are reviewed in the elaborate judgment of the case by Willis, J. The second of the cases is exemplified when a contract for the exportation of goods, although made before the outbreak of war with a party, who does not thereby become an alien enemy, may be rendered illegal and void by a Proclamation or Order in Council issued under Statutory authority, *e.g.*, under section 8 of the Customs and Inland Revenue Act 1879, or under section 1 of the Exportation of Arms Act, 1900.

Where the performance of an obligation undertaken by a British subject towards another British subject or an alien, formed before a war, has become unlawful or impracticable by reason of any prohibition connected with the war, the question arises whether such other British subject or alien friend is entitled to compensation in respect of the promissor's failure to perform his obligation. The answer to this question depends upon the nature of the prohibition. If the prohibition caused by the outbreak of war is the result of British Law, the failure to perform the obligation is excused, and no remedy is open to the promissor (Esposito *v.* Bowden, 1857, 7 E. and B., 763). If, on the other hand, the prohibition is the act of a foreign State the promissor becomes liable in damages (Barker *v.* Hodgson, 1814, 2 M. & S., 267; Jacobs *v.* Crédit Lyonnais, 1814, 12 Q. B. D., 589).

Any contract, which will be opposed to the provisions of the Proclamation of 5th August, 1914 dealing against contraband articles, will be illegal and void, whether made before or during the present war, or made with a British, allied or neutral subject.

The outbreak of war in which Great Britain is not a party may render performance of a contract illegal. In O'neil *v.* Armstrong (1895 2 Q. B. 418) an Englishman was engaged by the captain of a Japanese warship to act as a fireman on a voyage from Tyne to Yokohama. While the vessel was in the course of the voyage, war broke out between China and Japan. Further furtherance of the contract by the Englishman became illegal under the Foreign Enlistment Act, 1870, section 7 (33 and 34 Vic., c. 90.) He was entitled to leave the ship and sue for the wages agreed upon, since the act of the government in Japan had made his performance of the contract legally impossible.

The illegality of any part of a contract vitiates the whole, unless the illegal part can be separated from the legal, in which case the latter can be enforced (per Willis, J. in Pickering *v.* Ilfracombe Railway Company, 1868, L.R.C.P., 250) where a contract consists of several obligations, some only of which are unlawful, the remainder, if separable, are valid and enforceable (Maxim-Nordenfeldt Gun Co. *v.* Nordenfeldt, 1894, A.C., 535). But, as a general rule, a promise given for a consideration, part of which is illegal, is void *in toto* (Rex *v.* Northwingfield, 1830, 1 B. & A., 912).

It is a well-established proposition of law that contracts are dissolved either by the outbreak of war or by a subsequent change in the law made in connection with war. Impossibility of performance of a contract also dissolves the contract, where the parties have made no provision in their agreement as to the eventuality. This impossibility will not come under the term 'commercial impossibility,' by which is meant, *extreme or unforeseen cost or difficulty of performance* and will not excuse non-performance (Hongkong and Champoa Dock Co. Ld. *v.* Netherton Shipping Co. Ld., 1909, s.c. 37; Brown *v.* Royal Insurance Co., 1859, 1 E. & E., 853). If any one agrees to do work according to orders and specifications from the other party to the contract, he is not freed from his obligation by the fact that such work turns out to be impracticable (Gillespie *v.*

Howden, 1885, 22 Sc. L. R., 527). It has been seen that an impossibility of the above nature caused by war will have no effect on a contract made before or during war. Nothing short of sheer impossibility will serve as an excuse, and even then it only does so under particular circumstances (Jones *v.* St. John's College, Oxford, 1870, L.R.Q.B., 115.)

An express unconditional contract is not dissolved by its performance being or becoming quite impossible in fact owing to particular circumstances, *e.g.* war. This rule has not only been accepted by all the leading authorities (*cf.* Pollock's Principles of Contract, 7th Ed., pp. 247-248 and Anson's Law of Contract, 13th Ed., pp. 370-372) although supported by positive decisions, such as Kearon *v.* Pearson, 1861, 7 H. and N. B, 386; Budget & Co. *v.* Binnington & Co., 1891, 1 Q.B. 35 C.A. But it may be observed that a war dissolves implied contracts (Ford *v.* Cotesworth, 1870, L. R. 5 Q. B., 544; Hicks *v.* Raymond, 1893, A.C., 22); also a contract where both parties are prevented by foreign law from performing their respective parts of the agreement (Cunningham *v.* Dunn, 1878, 3 C.P.D., 443). It will be worth while to study in this connection Bayley *v.* De Crespigny, L.R., 4 Q.B., 185 for the exceptions to the general rule laid down above.

Exceptions:—The completion of a voyage which has become illegal, will, however, be excused, so will the performance of a contract of carriage which is interrupted by the capture of the ship. The neutral owner of goods on board will be exonerated from the payment of freights If, however, they are taken by captors to a port, almost as convenient as the port of destination, the captors will be entitled to any freight unpaid. *A fortiori* if the captors take the goods to a port where the owners would have preferred to send them, freight becomes due. The outbreak of war and the presence of hostile cruisers may, again, excuse exact compliance with the terms of the contract. The principle is that while a contract of carriage must be executed according to its terms, a ship cannot be expected to put herself in the way of capture. That would not tend to the

performance of her undertaking. Thus in the Franco-Prussian war, a German Ship, the *Teutonia*, was bound from South America with orders for one safe port in Great Britain, or on the Continent between Havre and Hamburg. Calling at Falmouth to ascertain which port it was, she was ordered to Dunkirk. While off that harbour she got news of the imminence of war, and declining to enter it, proceeded to Dover which is a Channel port where there might have been a proper termination of the voyage. The owners declined to receive the cargo except at a reduced freight. But they were held not to be entitled to do that, as the ship had not broken her contract by declining to go into Dunkirk and be captured there. The charterers ought to have indicated another and a safe port at which the ship would have discharged her cargo thus entitling herself to full freight (the *Teutonia*, 1872, L.R. 4 P.C., 171). War, therefore, though it may make supplies impossible to obtain, does not excuse a manufacturer or importer from continuing his supplies, or ship-owner from proceeding on his lawful voyage.

When a contract has been extinguished by supervening impossibility it will not affect a specific right acquired already under it by either of the party (Taylor *v.* Caldwell, 1863, 3 B &B., 826; Whincup *v.* Hughes, 1871, L.R. 6 C. P., 78; Anglo-Egyptian Co. *v.* Rennie, 1875, L.R. 10. C.P., 271). Thus a sum paid on engaging seats to view the Coronation procession of King Edward VII (Blakely *v.* Fuller & Co. 1913, 2 K.B., 760) or a deposit paid for the same purpose (Krell *v.* Henry, 1903, 2 K. B. 740) was not to be considered as lost and unrealisable.

If, at the time when the contract is made, there are two alternative modes of performance, only one of which is rendered illegal or impossible by the outbreak of war, or by a change in the law consequent thereon, then on the authority of Dacosta *v.* Davis, 1798, 1 B & P., 242 and Stevens *v.* Webb, 1835, 7 C & P., 62, the obligor must adopt the possible mode of performance. It would follow from Brown *v.* Royal Insurance Co., 1859, 1 E & E., 853, that where in a choice of alternatives an optional

mode of performance has been made, and the mode so chosen becomes subsequently impossible, the effect is the same as if the obligor had originally agreed to perform his obligation in the manner selected by him. But the Emergency legislation, it deserves to be remembered, may render those kinds of contracts legally impossible.

The American Courts have sometimes upheld some transactions of a very extraordinary nature which are akin to non-commercial contracts. The decision in point is that of Moosseaux *v.* Urquhart (1867, 19 La. Ann., 482) where an agent managing an estate in New Orleans for a Northerner was held to bind his principal and continue his agency during the Civil War.

To sum up the law on the subject of contracts will be best done by quoting the following pithy observation of Mr. Leslie Scott:—

'*Help to the enemy is the touchstone of illegality.* Our Courts regard as helpful to the enemy *every* such contract made *during* the war: the presumption is irrebuttable, a rule of law. In the case of contracts made *before* the war, our Courts permit of discrimination. They regard all further performance as helpful to the enemy and illegal. Where cessation of performance for an indefinite time means, commercially speaking, the end of the contract, they treat it as dissolved. But where such an interruption of performance does not go to the root of the business, then they treat the contract as suspended, *e.g.*, where the contractual undertakings are merely incidental to some right of property, as a share in a company. Our Courts treat the question as dependent on considerations of national defence; commercial interests are subordinated' (The Effect of War on Contracts, pp. 11, 12).

Chapter X

Effect of War on non-trading Corporations—On Contracts with Prisoners of war—On the implied condition in Contracts—On Contracts suspended by war clauses, *viz.* 'by act of God,' 'war preventing performance.'

The ideal corporations which subserve interests not exclusively private are in a different position so far as war is

concerned. If they serve any Governmental aim there is no doubt of their national character. They cover such corporations as colonizing companies. The fact of incorporation in a hostile country should not be sufficient in all cases to brand a corporation with the enemy character. If the personnel, management, and operations of the corporation are in the hostile territory, the rule is that the hostile character will attach to it. In Justice Story's opinion it is the place of management, rather than that of immediate activity, that ought to be the decisive factor. The Society for the Propagation of the Gospel *v.* Wheeler (1814, 2 Gall., 105)—a case decided by that eminent Judge and Jurist—was that of a body chartered for religious purposes in England and composed solely of British subjects. Its operations were at that date (1813) mainly limited to British territory but it had its operations in American territory as well, else it would not have occupied property in New York. The fact that its operations extended to the territory of New York was not held to divest it in any degree of its British character. So Story, J. declared it without hesitation to be an alien enemy. In fact, there is no difference between a corporation and an individual so far as that question is concerned (per Story, J. in the Society for the Propagation of the Gospel *v.* Wheeler). The view of Story, J. was upheld by Lush, J. in the Continental Tyre and Rubber (Gr. Br.) Ld. *v.* Thomas Tilling Ld. reported in the *Times* of 24th November, 1914, that a corporation created in England assumed the position of a British subject for purposes of a suit. But the Proclamations issued during the present war have left much loophole in the matter.[1] The Proclamation relating to Trading with the Enemy, dated the 9th September, 1914, has attached 'enemy character' only to those companies which have been incorporated in the enemy country. The loophole thus created is that there is nothing to question a British Company incorporated in Great Britain, having all the shareholders as German subjects, to obtain money from England in Germany.

[1] *Cf.* the arguments adduced on behalf of the plaintiffs in Orenstein & Koppel *v.* Egyptian Phosphate Co. Ld. (19 , S. L. T.,

From the above discussion it will follow that no contract can effectively be entered into or enforced against non-trading corporations which have foreign incorporation.

The contract of service made by a prisoner of war with the permission of the King's officers was held valid as the permission amounted to a licence (Sparenburgh *v.* Bannatyne, 1 B. and P., 163). Similarly in Maria *v.* Hall (2 B. and P., 236 in which no judgment was given) the contract of service was made with the consent of the person entrusted with the conveyance of the plaintiff as a prisoner of war to London, and may have been made under a licence from the Crown (Alcinius *v.* Nygreu, 1854, E. and B., 217). It must be observed that Roke, J., who took part in the trial of both the actions, was of opinion that the prisoner in the case of Sparenburgh *v.* Bannatyne was in the position of a prisoner of war *en parole*, who might be entitled to enter into contract at any rate in respect of necessaries, and who derived his capacity to do so from the licence of the Crown, which was implied in the grant of the privilege of being *en parole*. But it is submitted that neither Sparenburgh *v.* Bannatyne, nor Maria *v.* Hall supports the proposition that prisoners of war are to be clothed with the status or invested with the rights of persons voluntarily resident in the United Kingdom *per licentiam regis*. Prisoners of war may, it has been conceded, receive permission to work either in the service of the belligerent state or for private persons or on their own account (*cf.* the Hague Convention No. 4 of 1907, Art. 6) and they may be released *en parole*.

How war affects an implied condition in a contract will be evident from the decision of (1) Associated Portland Cement Manufacturers Ld. *v.* Cory and Son Ld., 1915, 31 T. L. R., 442, where ship-owners contracted to provide ships for six years necessary to carry plaintiffs' cement from the Thames to Rosyth. It was held that the parties had not impliedly stipulated that the contract was made on the undertaking that there would be peace; and the ship-owners were not released from their contract by the requisition of their ships by the Government

and by restraints and dangers of navigation consequent upon the outbreak of war; and of (2) Seville and United Kingdom Carrying Co. Ld. *v.* Mann, George and Co. (The *Times*, 15th December, 1915) in which an undertaking was given to pay an extra freight per ton on the whole of a cargo in consideration of the vessel being taken to a certain port. The engagement was held binding, notwithstanding that at the time of, and unknown to the parties to the contract, the greater part of the cargo had been requisitioned by British cruisers in pursuit of enemy warships, on the ground that the cargo had not ceased to exist.

Where a contract includes an express exception of restraints of princes, blockades, etc., it seems, that it is not cancelled immediately upon the occurrence of such events. After a reasonable delay, during which performance is excused, the contract may be cancelled, but not till it is shown that time is of the essence of the contract. Under modern conditions even a short delay will enable cancellation. Thus in Geipel *v.* Smith, 1880, L. R. 7 Q. B. D., 104, Cockburn, L. C. J., held that it was a sufficient answer that it was impossible to expect that the obstacle to performance would be removed within a certain time. 'It must be monstrous,' he says, 'to say that the parties must wait until the restraint be taken off; the skipper with cargo, which might be perishable, or its market value destroyed; the ship-owner with his ship lying idle, possibly rotting, the result of which might be to make the contract ruinous.' The mere imminent risk of capture was held to be sufficient in that case.

Ship-owners are generally in the habit of relieving themselves by the special war clause '*restraint of princes, rulers and peoples etc.*' It has been held that though it may affect performance, it does not necersarily confer a right to any payment which depends on performance.' The clause does not cover hostile acts, which are properly referred to as 'acts of the King's enemies' (*cf.* Scrutton's Charter Parties at p. 204). But it will surely cover the acts of allies and also covers the acts of the British Crown. Byles, J., asserts that the clause includes every species of *vis major* (Russel *v.* Niemann, 1864, 34 L. J. C. P.

10 & 14). It is submitted that even where there is no exception to that effect performance may be abandoned when it is clearly found that it has become *commercially* impossible.

It has been seen that when there is a time fixed for the performance of a contract, intervention of a foreign authority preventing the performance will not afford the same excuse as British interference would (Taylor and Co. *v.* Andrew Miller and Co., 1915, 31 T. L. R., 272). In this case the plaintiffs sold confectionery for export, but before the delivery an embargo was imposed on the exportation of confectionery. It was decided that the sellers were not entitled to say that the contract was at an end, as the usual course of business between the parties was that the goods should be delivered within six to eight weeks and that they should have waited a reasonable time to see if they could have carried out their part of the contract, which in fact, they would have done, as the embargo lasted for ten days only. Similarly in Jager *v.* Tolme and Runge (1915, 31 T.L.R., 381) where an embargo was placed by the German Government on the export of sugar, it was held that the circumstances were not such as to have precluded the sellers from being in a position to comply with the contract.

Another exception frequently introduced is that of '*war preventing performance.*' In such a case the outbreak of war will necessarily relieve the parties. It has been held that the clause should be interpreted to mean '*war making performance commercially unprofitable or preventing performance except at a ruinous sacrifice.*' Contracts will not be affected by such a clause if the war breaks out in a different part of the globe. It is proper that words should be used making the 'war clauses' clearer, as otherwise all trade is bound to get dislocated. The operation of war clauses may, however, prejudicially affect the insurance of ships or goods. (Nickels *v.* London and Provincial Marine and General Insurance Co., 1900, 70 L. J. (Q. B., 29; 17 T. L. R., 54) in which a bill of lading gave power to terminate the voyage and land the goods 'if it was judged imprudent to proceed on account of war.'

CHAPTER XI.

How legal proceedings by, or against alien enemies are affected by War—Old law—Gradual development—Recent decisions.

A stream of foreigners poured into England along with the Norman Kings. But at the outset the question of their alien status did not arise as the King's dominions extended beyond the British Isles. It was when those Kings lost their Continental dominions and English nationality and law came to be especially enforced that the question of status of those foreigners first cropped up.

Magna Charta C. 42 provides for certain privileges and protection for alien merchants, although it was stated therein that on the outbreak of war they are to be detained until information was received of the satisfactory treatment of the English merchants abroad. Upon the receipt of this information the foreign merchants were to be allowed to remain unmolested. This leads to an indistinct suggestion of the distinction between an alien enemy and an alien friend in those far-off times. Pollock and Maitland attribute the loss of this distinction to the growth of a national sentiment and a general detestation of foreigners caused by the plague of royal favourites. Nevertheless till the middle of the 18th century there was little or no distinction for forensic purposes between alien friends and alien enemies. And we have it from Littleton that the status of the former was, despite the fact of the existence of occasional statutes, giving aliens the right to a jury, quite as precarious as the latter (Tenures, Book II, sec. 196). Coke who wrote upon Littleton declared 'that the rights of aliens came under the various heads of villainage and that an alien, friend or enemy, was like the *pregrinus* outside the 'ambit of the King's Court, though not of the King's protection.' He might look, Coke maintained, to the protection of the criminal law of the country and of the King's armed force, but he had no strict right to the protection of civil remedies of King's Courts. Gradually the term 'alien' came to mean alien enemy.

When law came to recognise the difference between the two classes of aliens, alien enemies came to be regarded in quite an odious light. This is what Blackstone says about the alien enemies in his Commentaries (Vol. I, 2 bst Ed., p. 373) : 'Alien enemies have no civil rights or privileges unless they are here (England) under the protection and by permission of the Crown.' Also in the celebrated Calvin's case (1608, 7 Co. Rep., 1) it was laid down that 'if this alien becomes an alien enemy (as alien friends may) then he is utterly disabled to maintain an action or get anything within this realm. And this is understood of a temporary alien that being an alien may be a friend or becoming a friend may be an enemy.'

Gradual intercourse with the Continent imperatively demanded a change in the law limiting the exclusion of alien enemies from the law-courts. The modern law may be said to begin with the case of Wells *v.* Williams (1698, I Ld. Raym., 282) where an alien enemy living in England under the King's protection was allowed to sue on a bond by licence of the King. (Dr. Baty has expressed the view that this case was decided on the ground of the indulgence accorded to the resident Protestant subjects of Louis XIV.) It was at this stage that the plea of alien enemy was sufficient to prevent an alien enemy from suing in courts, though it was not then clearly established whether the disability admitted of any exceptions. In Wells *v.* Williams, Treby, C. J., held that an alien enemy living in England by the king's licence and under his protection might sue, although he might not come there since the war without a safe-conduct. His Lordship's observation ran as follows : " If he has continued here by the King's leave and protection, without molesting the Government or being molested by it, he may be allowed to sue, for that is consequent on his being in protection, but an enemy abiding in his own country cannot sue here." Five years later in Sylvester's case (1703, 7 Mod. Rep., 150) it was said : " If an alien enemy comes into England without the Queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage

of the law of England, nor for any wrong done to him here, but he has a general or special protection and it ought to come of his side in pleading." The nature of the action did not clearly appear, but 'alien enemy' was held to be a good plea in abatement.

The rule of disability received an extension in the year 1794 in the case of Brandon *v.* Nesbitt (1794, 6 T. R., 23). There the plaintiff was a British subject who had effected an insurance policy as the agent for an alien enemy principal. The principal was indebted to the agent in a sum which exceeded the amount claimed on the policy, so that 'the money...when received will not go out of the kingdom (as was supposed) to strengthen the hands of the enemy, but will be retained here by the plaintiff by way of set-off.' Lord Kenyon, C. J., held however 'that an action will not lie either by or in favour of an alien enemy.' The proceeds of a judgment though lawfully intercepted by the British agent would nevertheless enure to the benefit of the enemy principal; but it is stated in Villa *v.* Dimock (1692, Skin., 370) an alien enemy suing in *autre driot, e.g.*, an executor, is not precluded from recovering. In 1799 the disability of the alien enemy has become so firmly established that Sir William Scott based the prohibition of trading with the enemy in the *Hoop* (*inter alia*) on the procedural disability of the alien enemy. Thus in the course of his judgment he remarks: 'in the law of almost every country the character of alien enemy carries with it a disability to sue or to sustain an action in the language of the civilians, *a persona in standi in judicio.*' Similarly, Lord Halsbury in his Laws of England, Vol. I, p. 311, observes on the procedural disability in the following pithy way: 'the remedy only remains suspended and revives on the restoration of peace.' The peculiar character of the English law applies the principle with great rigour. The same principle has been received in the courts of all Nations. It has been unanimously held everywhere that no man can sue who is a subject of the enemy unless under particular circumstances he has been discharged *pro hac vice* from the character of an enemy. To quote Bynkershoek 'legality of commerce and the

mutual use of the Courts of Justice are inseparable.' It has been doubted whether Sir William was right in basing the prohibition of commerce upon the procedural disability, for that was as old as the 13th year of Edward the Second's reign, when Scotland was the enemy of England.

The decisions of the time of the Napoleonic Wars afford instances of the operation of the plea of alien enemy both against alien enemies and persons suing on their behalf.

To come to more recent times a new change has been brought about by the system of registration created by Orders in Council made under the Alien Restriction Act, 1914. Now what is the effect of registration? Does it confer any privilege or does it impose any restriction? These are the questions which naturally arise in the mind with reference to this topic. Sargant, J., in Princess Thurn and Taxis *v.* Moffitt (W. N. of 24th Oct. 1914, p. 379) gives the High Court decision on the point and his judgment has received the approval of the full Court of Appeal. In this case an alien enemy residing in the United Kingdom, who has complied with the requirements as to registration under the Alien's Restriction Act, 1914, and the Alien's Restriction Order, 1914, made thereunder, has been allowed a right to proceed with her action for defamation as a plaintiff against her alleged co-wife, on a contract during the present war. Sargant, J., said in that case that there appeared to be a general impression that during the continuance of a state of war an alien enemy as such was not entitled to any relief at law as a plaintiff in an English court, but in his Lordship's opinion that prohibition was too widely stated, and did not apply to a person in the position of the plaintiff's in the present case. The passage from Hall's International Law, 6th Ed., p. 388, bearing on the subject which Sargant, J. quotes with approval in his aforesaid judgment, is to the following effect: 'When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such

time as they, in fact, stay, and they are in the same position, as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country.' This passage was supported by the decision in Wells *v.* Williams (1698, 1 Salk., 40). It would seem, therefore, that in the opinion of the learned judge, registration removes the procedural disability not merely in the case of a plaintiff having a civil or commercial domicile, but also in the case of an alien enemy who happens to be in the United Kingdom and is 'allowed to remain during good behaviour.' It has to be noted that a married woman can now acquire this registration status independently of any act on the part of her husband.

It seems safe to say that the effect of the new system of compulsory registration is that, without complying with it, civil or commercial domicile in this country, will have no effect in removing the disability of an alien. The general rule which is deduced from the above is that an action cannot during war be brought by or on behalf of an alien enemy unless by virtue of a statute, or an Order in Council or Proclamation, or a Licence from the Crown, or unless he comes into the British Dominions under a flag of truce, a cartel, a pass or some other act of public authority that puts him in the King's peace *pro hac vice* (The *Hoop*, 1 Ch. Rob., 196; Wells *v.* Williams, 1698, 1 Salk., 46: Brandon *v.* Nesbitt, 1794, 6 T. R., 23: The *'Chile'* reported in the *Times* of 5th September 1914 where an alien enemy was not allowed to appear in the Prize Court in answer to the notice served on the ship: Robinson & Co. *v.* Continental Insurance Co. of Mannheim, W. N. of 31st Oct. 1914, p. 393: Princess Thurn and Taxis *v.* Noffitt, W. N. of 24th Oct. 1914, p. 379). The decision of Sparenburgh *v.* Bannatyne, 1797, 1 B & P., 163 was based on the doctrine of implied licence from the Crown. When the plaintiff in an action becomes an alien enemy after the action has been commenced by him he cannot continue it during the war (Le Bret *v.* Papillon, 1804, 4 East., 502: The Textile Manufacturing Co. *v.* Solomon, 1916, 18 B. L. R., 105). But in Vanheyen *v.* Wilson (1808,

9 East., 320), the Court refused to stay judgment in execution on a summary application because the plaintiffs after verdict became alien enemies. Thus both on American and English authorities an action can during war be maintained against an alien enemy, although, as a rule, he cannot himself sue; for neither reason, nor policy, forbids judicial proceedings against an alien enemy in favour of a friendly citizen (Dorsey *v.* Kyle, 1869, 96 Am. Dec., 617; McVeigh *v.* U. S., 11 Wall: 259; Robinson & Co. *v.* Continental Insurance Co. of Mannheim, W. N. of 31st Oct. 1914, p. 393).

The English courts are so averse to any intercourse with the enemy country that they will not sanction any communication with it, *e.g.*, a commission to examine witnesses, even in an action where neither party is an alien enemy (Barwick *v.* Cuba, 14 C. B., 492). An alien enemy who claims to have a title to sue on any of the grounds mentioned above, must show on what specific ground he sues for the title (*The Phœnix*, 2 Roscoe Prize Cases, 439; *The Froija*, Spink's Prize Cases, p. 37: *The Marie Glaeser*, 1914, 137 L. T, 469). If he has a licence he must plead it specifically (Sylvester's case, 1703, 7 Maud. Rep. 150. Similarly where the defence of alien enemy is set up, it must be made by the strictest proof. The person alleged to be an alien enemy must be shewn by the clearest evidence to be so either by reason of his nationality or his domicile (per Lord Ellenborough in Harman *v.* Kingston, 1811, 3 Camp. 152).

Alien Enemy Plaintiff:—An alien enemy, who is registered in accordance with Aliens Restriction Act, 1914, is entitled to sue and obtain relief in the British courts (Porter *v.* Freudenburg, 1915, 1 K. B., 857 C.A., approving the decisions in Princess Thurn and Taxis *v.* Moffitt, 1915, 1 Ch., 58 and in Volkl *v.* Rotunda Hospital (1914, I. R. 543). Even when an alien enemy has been subsequently interned as a civilian prisoner of war, his right to sue upon his former contract is not lost to him. His subsequent internment has no effect upon his civil rights. Permission, it has been contended,

involves the right to trade, to enter into contracts with British subjects and sue thereon, for suing is but a consequential right of protection. Internment does not operate as a revocation of licence (Schaffenius *v.* Goldberg, 1915, 1 K.B. 284, C.A.). But it has been clearly put forward that subsequent internment of an alien enemy destroys all his rights of action accruing before the war (Rex *v.* Superintendent of Vine Street Police Station and Ex parte Liebman, 1916, 1 K. B., 268). In the well-known reference made by the learned Munsiff of Dacca to the Calcutta High Court in the case of Abdul Quader Khalifa *v.* Fritz Kapp reported in 20 C. W. N., p. 691, it was held that the fact that the defendant Kapp had been interned did not make any difference in his position as it did not affect his liabilities.

Alien Enemy Defendant:—There is no rule of Common Law that suspends an action begun before the outbreak of war in which an alien enemy is defendant or prevents his appearing or conducting his defence either in person or by counsel (Scales *v.* Wülfing, the proprietor of the patent medicine Sanatogen and *in re* spy Kürpferle C. W. N., Vol. 19, Notes in December No., 1915). The American decisions of De Jarnette *v.* De Guiverville, 56 Miss. Rep., 440 and Meveigh *v.* U. S., 11 Wall. 259, have already paved the way by rulings to the same effect. That rule whether in America or in England could not have been otherwise as in that case it would have been opposed to all reason and policy that a natural-born subject should labour under any such disadvantage in his country in proceedings against an alien enemy. The other recent decisions on the same lines are those of (1) Robinson & Co. *v.* Continental Insurance of Mannheim (1915, 1 K. B., 155); (2) Zinc Corporation Ld. *v.* Aaron Hirsch and others trading as Aaron Hirsch & Sohn, 1915, 32 T. L. R., 7; (3) Halsey *v.* Lowenfeld, 32 T. L. R., 138. As to the right of an alien enemy to appear as a claimant in the Prize Court or to argue his claim before that Court (*cf.* the Möwe, 1915, P. C., I.). Thus briefly speaking a defendant becoming an alien enemy whether in British territories or outside them can be sued during war *in Proceedings*

commenced before or after the outbreak of war, and is entitled to be represented by Solicitor or Counsel, and to have all the ordinary privileges and be subject to all the ordinary disabilities of a defendant, except that (*i*) he cannot counterclaim, but may plead a set-off; (*ii*) he cannot take third party proceedings; (*iii*) he cannot take out execution for costs during war; (*iv*) he cannot take the benefit of the Courts Emergency Act, S. I.(7).[1]

Alien Enemy Appellant:—As an appellant an alien enemy (unless falling within the privileged exceptions) cannot, as a rule, appeal, and if notice of the appeal has been given before the outbreak of war, the hearing thereof will be suspended until the termination of the war. On the other hand an alien enemy defendant has the same right of appeal as any other defendant, whether he is sued under the Legal Proceedings against Enemies Act or otherwise.

Chapter XII

How the rules of Limitation and Prescription affect Contracts suspended by war.

The English courts have ruled, as Sir Robert Phillimore states by way of theory in his Commentaries on International Law, Vol. 14, at p. 723 'that the Statute of Limitations (21 Jac: I c. 16, s. 7) is no bar to a party, whether he be a subject of the realm or a foreigner, who was not in England at the time the cause of action occurred, or who continues to reside abroad.' This rule has tended in a manner to prevent the question of the effect of foreign war on the running of the Statute of Limitations from being litigated in the courts of England.

But the English legal authorities are still divided as to the question whether a war will affect the running of the Statute of Limitation or not.

The only English case of any moment relating to the question is that of DeWahl *v.* Brayne, 1856, 25 L.J. (Ex.) 343, in which

[1] For the above summary I am indebted to Mr. Arnold McNair in Law Quarterly Review for 1918, p. 124.

Lord Bramwell, who decided the case, observed in the course of his judgment that 'the inconvenient operation of the Statute of Limitation is no answer, and does not take the case out of the general rule.' The facts of the case were shortly these: A married English woman, living in England separately from her husband, who was an alien enemy domiciled in Russia, claimed to sue on a debt as a *feme sole*, and part of the argument adduced on her behalf was, that unless she would be allowed to sue, her claim would get barred by the operation of the Statute of Limitation.

The above view of Lord Bramwell has since been adopted by some of the eminent English jurists, such as Anson (*cf.* The Law of Contract, 13th Ed., p. 129) and Lindley (*cf.* The Company Law, 6th Ed., p. 53). But the International jurist, Professor Westlake, holds the opposite view and is supported by no less an authority than Wheaton (International Law, 5th Ed., p. 439). But Mr. Charles Noble Gregory in his very able and erudite article in the Harvard Law Review (Vol. XXVIII, 1914-15, pp. 673-682) declares that the dissenting English authorities have been consulted on the disputed points but it appears that they do not hold such opinion on the question as they have been hitherto credited with. The whole topic has been very reasonably and systematically treated from an America standpoint by Mr. Gregory in his learned contribution.

The most complete and authoritative decision on the point in America is that of Hanger *v.* Abbott (1867, 6 Wall. U.S., 532). Abbott of New Hampshire sued Hanger of Arkansas *in assumpsit*. The question arose in the trial whether the time during which the courts at Arkansas were closed owing to the rebellion was to be left out of consideration in computing the time fixed for the limitation of action. Clifford, J., who gave the opinion of the Supreme Court in that case, declared that debts existing prior to war between enemies were not annulled, but the remedy was merely suspended as a necessary result of the inability of an alien enemy to sue. The old English decisions, he said, were to be ignored as of little weight, on the ground that

they were made before the rules of modern International Law came into existence and that war only suspended debts due to an enemy and that peace had the effect to restore all remedies He added :—

'Text-writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the Statute of Limitations, but Plowden says that things happening by an invincible necessity, though they be against common law, or any Act of Parliament, shall not be prejudicial.' He concludes by saying :—

'Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the Statute is also suspended during the same period.'

It was held accordingly that the Statute of Limitations did not run while the creditor was incapable of suing owing to a state of war. The inability to sue seems to rest both on the closing of courts and suspension of intercourse.

The doctrine laid down in Hanger *v.* Abbott has been followed in a series of succeeding interesting American decisions, namely, the Proctor, 1871, 12 Wall. U. S. 700; Semmes *v.* Hartford Insurance Co., 1871, 13 Wall. U.S. 158 ; Brown *v.* Hiatts, 1872, 15 Wall. U.S. 177.

The doctrine thus seems to be well-settled in American Law that where the parties are divided by the 'line of war,' the Statute of Limitations does not run. Even where the parties are citizens of the same State, in which the courts are closed, the authorities converged to the same view (*cf.* Adger *v.* Alston, 1872, 15 Wall. U.S. 535, where in a suit between citizens both belonging to States adhering to the same Confederacy, the Statute was held not to run while war was existing).

The American decision as made in Hanger *v.* Abbott has been maintained by several well-known authorities as reasonable and conformable to justice and fairness and it is not too much to expect that it should be followed in England and in countries which is governed by English Law.

Chapter XIII

Interest on Pecuniary Contracts if suspended by war.

The established American law is that no interest is recoverable after peace for the time during which the debtor was prevented from paying the principal debt by the law which forbids commercial intercourse with the enemy (Hoare *v.* Allen, 2 Dallas., 102 ; Foxcroft *v.* Nagle, 2 Dallas., 132). But this rule applies only to cases where interest is recoverable as damages. War will not, as a rule, affect interest which has been expressly stipulated for in the contract (Egerton *v.* Berney, 62 Ill., 61 ; Lush *v.* Lambert, 2 Am. Rep., 142), where the debtor, or one of the several joint-debtors, resides in the same country as the creditor or his duly authorized agent, provided such agent was appointed before the war, interest will not be suspended (Ward *v.* Smith, 7 Wall., 452). An agreement by a debtor to pay after peace interest for the time being during which war continued is held to be binding (Englis *v.* Nutt, 2 Desauss., S.C., 623). But such an argument would require consideration in England.

The English law on the subject closely follows upon the heels of the American Law. In DuBelloix *v.* Waterpark (1822, 1 Dow. & Ryl., 16), Abbott, C. J., has expressed the English law on the subject in the following terms :—'But there is another objection to the plaintiff's recovering interest on the debt, for during the greater part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events during that period of the time the interest could not have run and it would have been illegal to pay the bill whilst the plaintiff was an alien enemy.'

But the view of Dr. Coleman Phillipson an eminent text-book writer, on the question is otherwise. He says :—

..that the only necessary measure, in accordance with an equitable interpretation of the doctrine of non-intercourse, is to suspend merely the payment of interest until the resumption of peace. This suspension, moreover, need not amount to a total discontinuance, for it is not conceivably antagonistic to

the interests of law or national policy to permit the interest to accrue till the end of hostilities.' He adds for his reasons thus :—

'The network of commercial transactions has become so far-reaching and complex, and the interests involved in trading relationships so great, that it is necessary to afford such security to foreign investors as will encourage them to furnish capital for large undertakings' (*cf.* Dr. Coleman Phillipson's Effect of War on Contracts, pp. 101-102).

Further the same authority in treating of enemy Debenture-holders maintains to the following effect :

'Debenture-holders ought to be permitted, on the conclusion of peace to sue for arrears of interest accrued on the debentures during the war. If any time be fixed for payment, interest ought to run till that time. In the case of perpetual debenture stock, interest should continue to run throughout the war.' (*Ibid*, p. 104.)

He admits : 'There are indeed several old cases to the contrary, but they were decided at a time when it was the practice even to confiscate debts.'

But, he says, 'consistent with the spirit of the present age, a more liberal practice has of recent years prevailed ; and various important relaxations and modifications of the older doctrine have been introduced.'

'For example,' he adds, 'in the South African War interest was regularly paid to debenture-holders in the South African Mining Companies, in spite of the decision[1] that a company incorporated under the laws of the Transvaal and carrying on business there was vested with enemy character. Thus, at the end of the war, the British Government, as successor to the Transvaal Government, paid all arrears of debenture interest to British shareholders of an enemy company—the Pietersburg Pretoria Railway Co. Ld. (*Ibid*, p. 104).

[1] *Cf.* Janson *v.* Driefontein Consolidated Mines, Ld. (1902) A. C. pp. 489 and 505.

Chapter XIV

Effect of War on Debts, Credit and Public Funds to Alien enemies—On Moratorium—On the powers of Courts to suspend Enforcement of Judgments and the Levying of Distress.

A word or two is necessary to justify the introduction of the above topics in this book. Although it is a fact that they have no direct bearing on the subject-matter under consideration yet it will be seen that they have indirect relation with contractual obligations during war in some way or other. It was usual at one time during wars to confiscate private property and debts owing to enemy subjects. France during the wars of the Revolution confiscated all the securities, personal or real, belonging to her enemy subjects. In the reign of George the Third a statute was passed in Great Britain for detaining the moneys, securities, chattels, and debts of French subjects, then at war with Great Britain, for the purpose of more effectually preserving money and effects in the hands of His Majesty's subjects belonging to or disposable by persons resident of France for the benefit of the individual owners thereof [*Vide* Geo. III, c. 79]. So too belligerent Denmark in 1807 repudiated all debts of her subjects due to Englishmen generally. During the American Civil War the debts and property of the Southern States were confiscated by the Northern States. So recently as 1879 Bolivia appropriated the property of her Chilian subjects. This sort of confiscation of enemy debts and property has been upheld by some of the reputed writers on International Law. Dicta supporting the view is found in Brown, *v.* United States, by Story J., in 8 Cr., 110. Following the observation of Sir Mathew Hale in his Pleans of the Crown, Vol. I., p. 95, which says : 'That by the law of England debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him,' it has been sometimes seriously maintained that property of enemies may be generally confiscated. But the books referred to by Sir Mathew do not furnish an instance of the seizure of debts, nor is there a decided case in support of the legality of such a seizure.

But views have since changed. The modern civilized states do no longer support such confiscation and appropriation. The Hague Convention of 1907 laid down in Art. 33 (*g*) that it was specially forbidden to destroy or seize the enemy's property unless such destruction or seizure was imperatively demanded by the necessities of war. Even in the time of military occupation of the territory of an enemy Art. 46 of the same Convention distinctly stipulates that private property must be respected and private property cannot be confiscated. The presentday legislation on the point has all been enacted in such a fair and charitable spirit as to conform itself to the rules of the Convention.

According to Bynkershoek confiscation by the state of all debts due to its enemy whether from itself or from its subjects was held proper. Vattel permitted a belligerent to confiscate his enemy's credits, but also added that there was in practice a relaxation of that principle. But nearly all modern writers (*e.g.*, Calvo, Heffter, Martens, Twiss, Wheaton and others) declare that debts due by the subjects of one belligerent state to the subjects of the other are to be free from confiscation. The only modern writer who holds a contrary view is Sir Robert Phillimore. The latter opinion is scarcely justifiable in view of the modern conception of the term that a war is in reality between states, and not between their private citizens. In the Middle Ages many nations adopted the rule of confiscation of actions, credits and all incorporeal rights. In England this rule had once been firmly established. At the end of the 15th century, in the war between Pisa and Florence, Pisa confiscated the debts due by her subjects to Florentines. And on a claim being made by a Florentine creditor, even Phillipus Decius,[1] acting as the arbitrator, actually admitted the validity of the confiscation.

But all modern writers share the view of Vattel (*cf.* Commentaries of International Law, 1815, vol. 3, p. 145) that no public funds of alien enemies should be confiscated. Besides such a procedure is not warranted by the Law of nations. A contract

[1] Phillipus Decius (1454—1535) was a professor of Canon Law in Padua and author of several works on Roman Law.

to pay interest to holders of National-stock or securities belonging to alien enemies shall no doubt remain in abeyance pending the hostilities. But as national honour and State's credit are at stake, it will not be proper that war should be made to interfere with the discharge of public obligations. It has thus become an established principle of International Law that neither the principal nor the interest of a State-debt can be sequestrated or confiscated, but will even have interest punctually paid upon it, though the principal may not be paid according to stipulation *flagranto bello*. The reason is said to be that loans could never be raised if their interests were liable to be suspended by the outbreak of war which might indeed be provoked for that very purpose. This equitable principle does not seem to extend to other obligations of the belligerent state. Similarly Hall maintains that a state contracting a loan is 'understood to contract that it will hold itself indebted to the lender but will pay interest on the sum borrowed under all circumstances.' (*cf.* Hall's International Law, p. 442.) Bluntschli and Fiore lend support to the view, but Martens shows some hesitation. This doctrine was fully discussed and adhered to in the Silesian Loan Controversy of 1752-56. In that case Frederick the Great withheld the payment to British subjects of the interest on their loan as a reprisal for the capture of Prussian vessels in accordance with certain rules of maritime law which he would not accept. It was argued by the English civilians that it would not be easy to find an instance where a prince had thought fit to make reprisals upon a debt due from himself to a private man. There is an implied confidence that this will never be done. A private man lends money to a prince only upon an engagement of honour, because a prince cannot be compelled, like any other men, by a Court of Justice. So scrupulously did England and France adhere to this public faith that even during the war they suffered no injury to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many Englishmen had money in the French funds, and many French had money in English hands. Although the Silesian Loan

Controversy was ultimately compromised, yet the expression of general opinion was distinctly averse to Frederick's conduct. Bluntschli who supported Frederick contended that the Prince by his action, did not mean really to deny the principle urged against him and that he merely resorted to measures of reprisal for injury inflicted on his subjects. But as Coleman Phillipson has said such a distinction is in this case untenable, as the question at issue is not simply the *reason* for his conduct, but the *nature* of his conduct. British adherence to the rule as suggested in her contention has been illustrated by the affair of the Russo-Dutch loan of 1814. (*Cf.* Phillimore's International Law, vol. ii, s. 90.)

Subsequent to the Silesian confiscation there have been several cases of confiscation of debts. Some of these were on the principle of reciprocity. On the Declaration of Independence by America some of the colonies passed laws confiscating or sequestrating debts due to British subjects, but the practice with them was not uniform. In the treaty of 1794 an express declaration against such practices was made in the following terms :—

"Neither the debts due from individuals of one nation to the individuals of the other, nor shares, nor monies which they have in the public funds or in the public or private banks, shall ever in any event of war or national differences, be sequestrated or confiscated; it being unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other, and in their respective Government should ever be destroyed or impaired by national authority, on account of natural differences and discontents." (*Cf.* Art. 10 of the Treaty of London, Nov. 19, 1794.)

In the war between England and France in 1793, the French Government sequestrated debts and other property belonging to British subjects, and the British Government retaliated. When peace was made and treaty was signed on May 30, 1814, restitution was provided for all the property confiscated during the war and a general liquidation of all the credits of the belligerents. In the war between England and Denmark in 1807 Danish vessels and other property were captured in the British

ports and on the high seas. Denmark retaliated by confiscating debts due from Danish to British subjects and ordering them to be paid into the Royal Treasury. In 1861 the Confederate States of America adopted confiscatory measures not only against the Northerners but also against allies domiciled in the enemy states. But this conduct formed at the time subject of strong censure and condemnation. (*Cf.* Lord John Russel's strong remonstrance in the Parliamentary Papers, 1862, North America, 108.) Gradually the principle came to be recognised in English law that the rights of every subject to money due to them from British subjects is not to be destroyed by the outbreak of war but merely suspended till the conclusion of peace (*Alcinous* v. *Nigreu*, 4 E. & B., 217).

The position is now clear in English law that loans to a belligerent before the war are not interfered with beyond the suspension of the interest thereon and it is equally clear that such loans during the war are opposed to all established principles of International Law. At the time of the Crimean War it was ruled in *R.* v. *Hensey* (1 Burr., 650), that the purchase of enemy-stock by a British subject was a misdemeanour by 17 and 18 Vict., c. 123.[1]

In French law any one who engages in schemes or enters into communication to supply the enemy with money is guilty of treason (Art. 77 of the French Penal Code).

The German law on the point seems to be of the same effect. The German banker Güterbock was considered guilty of treason by the Prussian Criminal Court in 1871 because he subscribed to the French war loan—a transaction which was by itself an illegality according to the German Code.

The English law also holds that a resident of England cannot make a contract to raise loan for the assistance of a foreign State in its war against an ally or against a friendly state without the licence from the Crown and condemns contracts for loans and

[1] "An Act to render any dealing with securities issued during the present War between Russia and England by the Russian Government a Misdemeanour." (1854).

subsidies with rebel-subjects to enable them to make war against the Sovereign *De Wutz* v. *Henricks* 1824, 9 Moo. P. C. Rep., 580).

Loans made to a belligerent state by a neutral Government is regarded as a violation of neutrality. But private contracts made by neutral subjects with enemy subjects will not be abrogated. The supplies themselves are to be considered as contraband though much would depend on the surrounding circumstances. There is, however, no rule of International Law that the contractual obligations incurred before the outbreak of war by a state, subsequently conquered and annexed by Great Britain, will pass upon annexation, as a matter of course and for want of express reservations, to Great Britain. The conquering Sovereign can make any conditions respecting the financial obligations of the conquered country, and it is entirely in his option to what extent he will adopt them (*Wolff* v. *Oxholm* 1817, 6 M. & S., 72). But one must not forget that when Alexander the Great, by conquest, became master of Thebes, he remitted to the Thessalians a hundred talents which they owed to the Thebans. This exemplifies the doctrine that the sovereign has naturally the same right over what his subjects may owe to enemies. It will, of course, be of no use to enforce those obligations against the Crown by a Petition of Right. There is no settled law on the point. It is all military force and it is no duty of the conquering sovereign when concluding peace to give any undertaking as to the obligations which he may accept (*cf. West Rand Gold Mining Co.* v. *Reg.*, 1905, 2 K. B., 391).

The Moratory Law under the Postponement of Payments Act (1914, 4 & 5 Geo., c. 11), has the effect that the King may by proclamation authorize the postponement of payment of any bill of exchange, of a negotiable instrument, of any other payment in pursuance of any contract to such extent, or for such time, or subject to such conditions or provisions as may be specified therein. It has to be noted here that although the Crown has reserved to itself the right to postpone payments in pursuance of contracts made during war it has not been known to have done so yet.

The exceptions to the above rule have now to be considered. The Moratory Law does not affect the validity of contract nor does it apply to obligations which are not contractual (*Emmanuel College Cambridge* v. *Nobbs*, 1914, 137 L.T., 567). It only extends the time of payment on contracts to which it applies. English law recognises foreign Moratory Law in an action on a foreign bill of exchange (*Rouquette* v. *Overmann*, 1875, L.R. 10 Q.B., 525).

An alien enemy residing in Great Britain will be allowed to take advantage of the Moratory Law (*Robinson Co.* v. *Continental Insurance Co. of Mannheim* reported in the *Times* of 17th October 1914).

The Courts Emergency Powers Act of 1914 (4 & 5 Geo. *V.* c. 78) and the rules thereunder are intended for the relief of debtors who for the time are unable to discharge their debts by reason of causes and circumstances due, directly or indirectly, to the present war. The relief applies in the following cases:—(*a*) to the enforcement of judgments and orders for the payment of money; (*b*) to the operation of certain remedies which under normal conditions are open to creditors without the intervention of the Court (*e.g.*, distress, sale, forfeiture, etc.); and (*c*) to certain proceedings in the Courts by which a creditor under normal conditions may obtain an order affecting the debtor's property (*e.g.*, ejectment, foreclosure, etc.).

It is quite patent from the foregoing legal enactments how prone they are to affect all contracts indirectly so long as the war conditions prevail.

In order that a blockade may be binding and that the penalty for its breach may be enforceable against neutral vessels, the captor who seeks to procure condemnation of the vessel must show that the blockade was duly established; that it was effective; that it was maintained continuously and enforced against all vessels; that there was some act of violation by the captured vessel; and that there was actual or constructive knowledge of the existence of the blockade on the part of those responsible for the navigation of the vessel (*Cf. The Franciska*, 1854, 25 Spinks, 113). The cargo on a ship which is guilty of

running a blockade is also liable to the penalty of condemnation (*Cf. The Panaghia Rhomba*, 1858, 12 Moo. P. C., 168).

(*b*) The belligerent has a right to capture contraband articles of war even though they are found in a neutral vessel. The hostility of the cargo-owner *per se* negatives the neutrality of the shipowner. But if the shipowner is privy to the contraband adventures he makes himself thereby unneutral and his vessel becomes liable to confiscation. Some governments—*e.g.*, the Russian in the Russo-Japanese War—published a declaration to the effect that they would treat as unneutral every ship more than half of whose cargo was contraband, and this rule was adopted in the Declaration of London (Art. 40). But apart from any arbitrary presumption of the kind, the hostility or neutrality of the shipowner, is a matter for evidence. If the ship is carrying false papers or doing anything which betrays a guilty conscience in those navigating her, the belligerent Prize Courts usually draw the inference that the shipowner has committed a breach of neutrality and will condemn the ship (*Cf. The Margaretha*, 1 Ch. Rob., 190; *The Imina*, 3 Ch. Rob., 167 and *The Charlotte*,, 5 Ch. Rob., 505). The condemnation of a ship in each instance will depend upon the particular circumstances of the case. In the case of the *Friendship* (1807, 6 Ch. Rob. 426), the American vessel, on a voyage from Baltimore to Bordeaux with some innocent cargo and ninety French mariners, was captured by an English vessel and condemned on the ground that she was carrying military persons. Similarly in the case of the *Atlanta* (1808, 6 Ch. Rob., 440) the vessel was condemned as she was carrying dispatches, for that constituted an act of hostility more important in those pre-wireless days than now. Also that happened in the case of the *Caroline* (1802, 4 Ch. Rob., 256) a Swedish vessel, which was chartered at Leghorn to make voyages in the Mediterranean, not to touch at the French ports that were blockaded. During the charter the vessel was fitted out as a transport for conveying troops to Alexandria. The ship was captured when Alexandria was taken. She was lost while in the hands of her captors. An

action was brought by the shipowners to recover her value from the captors. The action was dismissed on the ground that she was chartered to the belligerent.

The important principle deduced from the above cases is that where a neutral makes himself unneutral by breach of blockade, carriage of contraband or otherwise, he excludes himself by his own act from the immunity due only to real neutrality and cannot complain if the belligerent power defends itself against such private hostility.

The only aspect of neutrality that has been dwelt with by the English Statute law is the duty to abstain from armed resistance. The Foreign Enlistment Act, 1870 (33 and 34 Vict., c. 90), provides that it is a misdemeanour for a British subject to engage in the naval or military service of a foreign state at war with any friendly state without the licence of the King. It is also a misdemeanour to quit the kingdom with a view to engaging in such a service. The Act also provides that anyone who within the King's dominions and without his licence, builds or agrees to build a ship with knowledge or having reasonable cause to know that it will be employed in the military or naval service of a foreign state at war with a friendly state, equips any such ship withlike knowledge, or increases the war like force of any ship in the naval service of a foreign state at war with a friendly state while the ship is in the King's dominion or prepares, or fits out any expedition against the dominions of any friendly state, is guilty of a misdemeanour punishable with fine or imprisonment; and in the case of illegal ship-building the ship and its equipment are forfeited to the Crown. Instance of such a forfeiture is to be found in the case of the *Gauntlet* (1872, L. R. 4 P. C., 184). In that case a French ship of war captured a Prussian ship in the English Channel and put a prize crew on board. The prize was driven by stress of weather into the Downs, where she anchored in British waters. She lay there for two days, and then the French Consul at Dover employed the British steamtug *Gauntlet* to tow the prize in Dunkirk. The Crown instituted

a suit to get the tug condemned for a violation of the Foreign Enlistment Act. The Privy Council held that the engagement by the owners of the tug for the express purpose of towing the prize crew, the prize vessel and the prisoners speedily and safely to French waters, where the prisoners and prize would be taken charge of by the French authority and the prize crew set free, was dispatching a ship for the purpose of taking part in the naval service of a belligerent, and condemned the tug as a forfeiture to the Crown.

It is now to be seen whether such acts of hostility, as have been exemplified above, will have any legal effects upon the contract between belligerents and neutrals—contracts whose performance is *de facto* interrupted or prevented thereby, or rendered liable to interruption or prevention. Each contract is to be adjudged by the particular terms thereof and by the law applicable to its interpretation and operation. A typical case will illustrate the point. Let the act of hostility be the carriage of cargo of contraband. It is captured and condemned. It may be assumed that the cargo is afloat under a contract of sale, a charter party and a policy of insurance. The contract of sale raises the difficulty. If sold c. i. f., the risk is probably the buyer's; if sold "delivered" at a port, the risk is probably the seller's: in such case the terms of the contract will answer the question.

Some important considerations in contracts of the class in question, it has been suggested, will be lost if there will be any condition or warranty of neutrality. The result of the legislation of the English statute-law is to render illegal contracts which fall within its prohibitions, and therefore to make them void.

Chapter XV

Effect of War on the Hague Regulation respecting Trading with the Enemy.

This is another of the matter in which a divergence of opinion exists between the Continental States on the one hand

and Great Britain and the United States of America on the other. The question has often arisen whether Art. 3, clause (*h*) of the Hague Regulations of 1907 as to warfare on land, would prevent the application of any of the rules against trading with the enemy. The Article provides, among other things, that the several parties to the Convention are not to be allowed, 'to declare abolished, suspended, or inadmissible in a Court of Law the rights and actions of the Nationals of the hostile party.' It is quite evident from the provision that the prohibition of intercourse with the alien enemy during the war has not been affected in any way by it. What the stipulation means is this that the claims existing at the outbreak of war, either cease to exist, or cease to be enforceable by action. The leading English authorities, of which Professor Westlake may be particularly mentioned, however, maintained that the whole *Règlement*, of which the Article forms a part, relates only to military measures and that therefore clause (*h*) simply means that the commander of an army, who had penetrated into the enemy's country, may not prevent the inhabitants and courts of that country from satisfying or declaring actionable claims of their fellow-countrymen. Thus a 'hostile' is to be heard in courts of his enemy if he can *lawfully* get there. It has been suggested by Bordwell (Laws of War, p. 210) that the provision abolished rules of non-intercourse with the enemy. But it has been strictly maintained that the absolute and rigorous necessity of non-intercourse across the line of war and the rule of law therefor are in no wise affected by the Convention. It enlarges the rights of hostiles lawfully within the territory of the other belligerent—and possibly—in neutral territory.

A long and interesting discussion of the subject has been made in *re Mertens Patent* recently decided in the Court of Appeal in England by six eminent judges and reported in 31 T. L. R. at pp. 167 and 168. It has been observed there :—

"The substantial question being whether the operation of this paragraph is or is not to abrogate the old rule (not peculiar to English law, though it has been more prominent in

England than elsewhere) that an alien enemy's rights of action are suspended during the war, jurists of eminence have expressed widely divergent views upon the point and this Court has given to those views its very careful consideration. We are all clearly of the opinion that the paragraph in question cannot be treated as effecting any such abrogation. If we look in the first place at the terms of the paragraph itself and apart from its collocation and context we find that what it forbids is, as also in paragraph (*d*), "a declaration:" "it is forbidden to declare." This has no application to a country in which, as in England, there is no room for a "declaration." By the existing law of the country the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of the outbreak of war any alien enemy may possess. It is interesting to observe that Dr. Sieveking, an eminent German jurist, while holding that the paragraph was intended to have all the effect foreshadowed by Herr Göppert (one of the German Delegates at the Conference), is of opinion that at England at any rate it is ineffectual because it only prohibits some executive authority from declaring that rights of action are suspended, extinguished or inadmissible. He rightly points out that no such declaration is required in English law for the reason already given" (p. 167).

PART II

Effects of War on Contracts between Belligerent and Neutral

Chapter XVI

Contracts between Belligerent and Natural considered—Summary of the International rules on the subject as adopted in English Jurisprudence.

Contracts between citizens of the two belligerent states have been hitherto dealt with. Now contracts between citizens of one of the belligerent states and those of a neutral state will call for treatment.

War not only affects the relations between the belligerent states and their subjects but it, at the same time, affects the position of the neutrals, that is to say, those who remain aloof from the war. In time of war a neutral state has its rights against the belligerent as well as its duties towards it. The Law of Nations that deals with this branch of the law forms the law of Neutrality. It is a law of recent growth and has been evolved by the compromise of two conflicting theories, (1) the right of the belligerent to carry on his warfare as best as he can; and (2) the right of the neutrals to carry on his ordinary course of business without in any way interfering with the recognised rights of the belligerent powers.

The law of Neutrality falls under two heads: (1) The first deals with the rights and obligations of *the belligerent and neutral states as between themselves*; (2) the second deals with *the relations of belligerent states towards neutral subjects.*

The Common Law does not avoid or even suspend contracts between belligerent neutrals. A contract to run a blockade or to carry contraband is perfectly illegal. The law does not imply any warrant of neutrality.

So when a belligerent captures or condemns a cargo as contraband, or a ship for breach of blockade, contracts relating

to either are affected in the sense that only their commercial object is frustrated. The capture or condemnation is only an external event and will have consequence upon the material aspect of it. Their legal object is not affected thereby. The legal nature of the consequence will depend upon the interpretation of and the rules applicable to the particular contract affected and for a determination of the situation resort must be had to the law of marine insurance, of carriage by sea, of sale of goods, and of other specific branches of the law of contract.

From a practical point of view the interference with contracts of neutrals which results from the application of the International rules of neutrality is fraught probably with more important consequences than the effect of war upon contracts between the belligerents themselves.

A short summary of the International rules on the subject as adopted in English Jurisprudence will be greatly helpful in understanding the law thereon.

(1) Neutrals subjects must always remain neutral. If a neutral subject commit any unfriendly act against any of the belligerents, that belligerent is entitled to complain and to stop him from combining with the enemy.

The neutral subject has the right to carry on trade as usual with the subjects of either belligerent, except in so far as such trade is calculated directly to prejudice or destroy the operations of war by one of the belligerent, or promote those of the other. In such cases the belligerents whose operations have been interfered with will be entitled to restrain the acts of the offending neutral and confiscate the property involved.

The law as to what goods and ships may be molested by belligerents and captured and condemned has been summarized in the Declaration of Paris 1856. A neutral flag can cover enemy goods with the exception of contraband of war; and neutral goods with exception of contraband of war are immune even under an enemy's flag. The law on this point is a compromise between two conflicting principles yet wanting a satisfactory solution. One principle provided that the liability of

property to capture depended on the neutral or enemy character of its owner and not on the character of the vessel in which it was conveyed. The other provided that the liability of the property to capture depended on the neutrality of the vessel in which such goods were carried.

(2) A belligerent may interfere with neutral commerce in various ways,

(*a*) Exercise of the right of blockade. This is an act of war carried out by the warships of the belligerents, intended to prevent access to or departure from a defined part of the enemy's coast Neutral traders can defy such a right at their own risk.

Chapter XVII

Concluding Remarks.

Two points of the greatest practical importance relating to this subject, namely (1) the position of alien enemies and (2) the nature of commercial contracts may be summed up in the following way :—

(1) Alien enemies who are in the British Isles but have not a civil or commercial domicile nor any licence from the Crown, but have observed the requirements of the Aliens Restriction Orders, are under the existing proclamations enemies and subject to their disqualifications. Determination of the status of enemies is strictly within the province of the Executive Government by the peculiar nature of the English Constitution. (*Cf.* Leslie Scott's Effect of War on Contracts, preface, pp. iv & v.) But let it be noted that the new statutory registration not only gives a general licence to aliens to remain within the realm, but conveys, by implication, licence to carry on business, so far as not restrained by internment or special regulation, and to appear in the King's courts (*cf.* Anson's English Law of Contract, 14th Ed.; The Law Quarterly Review, vol. xxxiii, No. 130, April, 1917).

(2) Contracts made *during war* are absolutely avoided and contracts made *before the war* are merely suspended. This is the view taken by all text-book writers. Lord Halsbury recognised the rule in his decision of the *Driefontien* Case (1902) A.C, 484 in the following words :

"If war ensues, such a contract (entered into before the war) is suspended owing to the fact that an alien enemy cannot sue thereon during the war in the courts of either country; but *the rights under it are unaffected*, and when the war is over the remedy in the courts of either country is restored."

Pitt Cobbett in his 'Cases and Opinions on International Law,' 3rd Ed., vol. ii, at p. 66, observes on the point thus :—

"Contracts or other transactions entered into before the war.....are in general (subject to exceptions) merely suspended during the war as regards *the right of performance and the right of suit*.....Nevertheless, even such transactions will be abrogated (1) if they enure to the aid of the enemy; or (2) if they cannot be carried out without some dealing with the enemy; or (3) if they are in their nature incapable of suspension. On the other hand, transactions which are entered into after the commencement of the war.....are in general illegal and void .....With regard to existing transactions and relations, the primary rule—which applies to all cases not excluded on some special ground—is that they are suspended during the war both as to their legal effects, and in strict law as to all rights of suit thereon, but revive on the restoration of peace."

The only note of difference in the matter is struck by Mr. Leslie Scott. He says :—"Contracts with enemies made before the war are dissolved and not merely *suspended*, though the dissolution does not affect vested rights, which are suspended during the war, and will be enforceable when it is over. The effect of a war upon actual and existing contracts can, in the English Constitution, only be determined conclusively by the courts, although it is within the competence of the Executive

to prohibit or authorize certain types of transaction with enemy persons." (*Cf.* Leslie Scott's Effect of War on Contracts, Preface, pp. iv & v).

Absolute non-intercourse with the enemy, commercially and economically, is the refrain which runs through all the judicial utterances on the subject. Interference with the enemies' trade is as effective a blow as the use of the bullet or the shell. It is as much a patriotic duty to injure the subjects of the enemy state, to dry up the springs of their prosperity, to raise the price of their food supplies, to impede their trade and their intercourse with the outside world as it is to participate in the actual warfare with them.

The Statutes, Orders in Council, and Proclamations, which have been issued from time to time since the outbreak of the present war, all point to that end and simply supplement what Common Law has provided on that score from days of yore. All considerations of justice and equity, it has been held, are to be subordinated to that end. But no rule shall be so construed or given effect to as will injure the interest of the natural-born subject. Their interest and convenience should always be considered, and exemption is to be made in their favour even though it would involve intercourse with the enemy. Such of the questions as were kept open and undecided during the Transvaal War have since met with either judicial pronouncements or legislative enactments; others are being decided upon during the progress of the present war. But it is presumed that fresh cases will arise after the termination of the hostilities out of some of the novel and complex situations calling for fresh decisions or necessitating fresh legislation.

It has been felt that the Law of Companies with enemy shareholders which has been settled by five of the notable English Judges (Lord Reading, C. J., Lord Cozens-Hardy, M. R., Kennedy, Phillimore, and Pickford, L. J. J.) in the Continental Tyre Case has been based upon too technical a ground and requires revision in view of the able, learned and

dissenting judgment of Lord Justice Buckley (now Lord Wrenbury). It has also been realised that clear and precise legislative pronouncements should be made on the question of interest on pecuniary contracts and the running of the Statute of Limitations during the pendency of a war. It is submitted that the several Statutes, Orders in Council and Proclamations, which have been issued since the outbreak of the present hostilities, are in many cases wanting in lucidity and consistency. The decision in *Orenstein and Koppel* v. *Egyptian Phosphate Co. Ld.* (1915, 52 Sc. L. R., 54) would amply bear out that statement. In that case the construction of Articles 3 and 6 of Proclamation 2 of 1914 presented great conflict of views inasmuch as the plaintiffs, although a German firm, claimed the right to continue their right of appeal by reason of the company being registered under the Companies (Consolidation) Act of 1908 in London and having had a local branch. Attempt should, therefore, be made, when the terrible pressure of work and anxiety caused by the present momentous crisis, to which they were presumably due was over, to correct their imperfections in the light and exprerience of those who had had to suffer under obivious defects and deficiencies.

Although there is no clear pronouncement from the legislature in support of the view yet the English and American decisions will be as a matter of course followed in India when occasions will arise. The reference made by the Munsiff of Dacca to the Calcutta High Court in the case of *Abdul Quadet Khalifa* v. *Fritz Käpp* (I. L. R., 43 Cal., 1140; 20 C. W. N., 691) and the decision in the *Textile Manufacturing Co.* v. *Salomon Bros.* (I. L. R., 40 Bom., 575) in the Bombay High Court set clearly out the proposition. In the Calcutta case it was held that an alien enemy could be sued in courts in British India on a cause of action, whether arising before or after the war, and had every right to prosecute his case in accordance with established laws of procedure. It was also held there *inter alia* that the internment of the alien enemy did not make any difference in the view. The Bombay case ruled

that the contract of an alien enemy became dissolved on the outbreak of war and all engagements founded thereupon would therefore naturally fall through.

In conclusion it should be remembered that on the termination of war the belligerent states would resume their normal attitude towards each other and the acts of hostility between them ought to cease. In default of an express provision to the contrary the *uti posse detis* doctrine is to prevail and all property at the time under the control of either belligerent should vest absolutely in each.

INDEX